(19,443.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 343.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States to the honorable the judge of the district court of the United States for the eastern division of the eastern judicial district of Missouri, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, at the November term, 1903, thereof, between The United States of America and Joseph Ralph Burton, defendant, a manifest error hath happened, to the great damage of the said defendant, Joseph Ralph Burton, as by his complaint appears;

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, District of Columbia, and filed in the office of the clerk of the Supreme Court of the United States, on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right,

and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of July in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk Supreme Court United States.

Allowed by
DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.

[Endorsed:] No. 4992 The United States *vs.* Joseph Ralph Burton Writ of error to Supreme Court Filed Jul- 23 1904 James R. Gray clerk.

Return to Writ.

UNITED STATES OF AMERICA, }
Eastern Division of the Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the United States Supreme Court a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said district court, at office in the city of St. Louis, this 3rd day of August, A. D. 1904.

{ Seal of the United States District Court, Eastern Division of the Eastern Judicial District of Missouri. }

JAMES R. GRAY,
Clerk of said Court.

The United States of America to the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court, at the city of Washington, thirty days from and after the day that this citation bears date, pursuant to a writ of error, filed in the clerk's office of the district court of the United States for the eastern division of the eastern judicial district of Missouri, wherein Joseph Ralph Burton is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the

judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 9th day of July, in the year of our Lord one thousand nine hundred and four.

DAVID J. BREWER,
Associate Justice.

Service of citation hereby waived this 23 day of July 1904.
BERT. D. NORTONI,
Ass't U. S. Attorney.

[Endorsed:] No. 4992 The United States *vs.* Joseph Ralph Burton Citation Filed Jul- 23 1904 James R. Gray, clerk.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Be it remembered that heretofore, to-wit: on the 23rd day of January, 1904, there was returned into said court and filed in the clerk's office thereof, an indictment which is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA, }
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, at the November Term, 1903, of said Court.

The grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oaths present: That Joseph Ralph Burton was at all of the times and dates

hereinafter mentioned, and now is a member of the Congress of the United States of America, to wit: a Senator from the State of Kansas, duly elected and chosen by the legislature of said State of Kansas for a term of six years, expiring on the 4th day of March, A. D., 1907, and was at all of the said times duly qualified, admitted and acting as such Senator.

And the grand jurors aforesaid, on their oaths aforesaid, do further present: That on the 26th day of March, A. D., 1903, at the city of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, the said Joseph Ralph Burton, Senator as aforesaid, did unlawfully, knowingly, willfully and corruptly take, accept and receive from the Rialto Grain and Securities Company (a corporation duly organized under the laws of the State of Missouri) the sum of five hundred dollars, lawful money of the United States, of the value of five hundred dollars (the particular kinds and denominations of which are to the grand jurors aforesaid unknown) as compensation for the services of him, the said Joseph Ralph Burton, Senator as aforesaid, theretofore, to-wit: on the 22nd day of November, A. D. 1902, and on divers other days between said last mentioned date and the said 26th day of March, A. D. 1903, rendered by him, the said Joseph Ralph Burton, Senator, as aforesaid, to the said Rialto Grain and Securities Company before the Post Office Department of the United States, in a certain matter then and there pending before said Post Office Department, in which the said United States was directly interested, that is to say: whether the said Rialto Grain and Securities Company had violated the provisions of section 5480 of the Revised Statutes of the United States, in that it (said company) had through its officers, agents and servants devised a scheme and artifice, to defraud, which was to be effected by said Rialto Grain and Securities Company, through and by its officers, agents and servants, in opening correspondence and communication with divers persons resident within the United States, by means of the Post Office Establishment of the United States, and whether said Rialto Grain and Securities Company, by its said officers, agents and servants in and for executing said scheme and artifice to defraud, had placed or deposited any letter or packet in any post office of the United States, to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance of the authority vested in him, by law, to ascertain, find and determine from the evidence satis-

factory to him, the said Postmaster General, whether he should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain and Securities Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2, 1895) any and all letters addressed to said Rialto Grain and Securities Company, and sent to or through the Post Office at St. Louis, Missouri, by means of the post office establishment of the United States.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that the services so as aforesaid rendered to the said Rialto Grain and Securities Company, by the said Joseph Ralph Burton, Senator as aforesaid, consisted in part of visits to the said Postmaster General, the Chief Post Office Inspector, and other officers of the Post Office Department of the United States, and of representations and statements made to the said Postmaster General, the said Chief Post Office Inspector, and said other officers, which said visits, representations and statements so as aforesaid made by the said Joseph Ralph Burton, were made with a view and for the purpose of inducing said Postmaster General, the said Chief Post Office Inspector, and said other officers, to decide the question so as aforesaid pending before said Post Office Department in a manner favorable to the said Rialto Grain and Securities Company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

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Second Count. And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that Joseph Ralph Burton was at all of the times and dates hereinafter mentioned, and now is a member of the Congress of the United States of America, to-wit: a Senator from the State of Kansas, duly elected and chosen by the Legislature of said State of Kansas for a term of six years, expiring on the 4th day of March, A. D., 1907, and was at all of said times duly qualified, admitted and acting as such Senator.

And the Grand Jurors aforesaid on their oaths aforesaid, do further present: that on the 26th day of March, A. D. 1903, at the City of St. Louis, in the State of Missouri, and within the Division and District aforesaid, and within the jurisdiction of the court aforesaid, the said Joseph Ralph Burton, Senator as aforesaid, did unlawfully, knowingly, willfully and corruptly take, accept and receive from the Rialto Grain and Securities Company (a corporation duly organized under the laws of the State of Missouri), the sum of five hundred dollars (the particu-

lar kinds and denominations of which are to the Grand Jurors aforesaid unknown) as compensation for the services of him, the said Joseph Ralph Burton, Senator as aforesaid, theretofore, to-wit: on the 22nd day of November, A. D. 1902, and on divers other days between said last mentioned date and the said 26th day of March, A. D., 1903, rendered by him, the said Joseph Ralph Burton, Senator as aforesaid to the said Rialto Grain and Securities Company before the Post Office Department of the United States, in a certain matter then and there
8 pending before said Post Office Department, in which the said United States was indirectly interested, that is to say: whether the said Rialto Grain and Securities Company had violated the provisions of Section 5480 of the Revised Statutes of the United States, in that it (said company) had through its officers, agents and servants devised a scheme and artifice to defraud, which was to be effected by said Rialto Grain and Securities Company, through and by its officers, agents and servants, in opening correspondence and communication with divers persons resident within the United States, and whether said Rialto Grain and Securities Company, by its said officers, agents and servants, in and for executing said scheme and artifice to defraud, had placed or deposited any letter or packet in any post office of the United States, to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance of the authority vested in him by law, to ascertain, find and determine from evidence satisfactory to him, the said Postmaster General, whether he should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain and Securities Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by Section 3939 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2, 1895) any and all letters addressed to said Rialto Grain and Securities Company, and sent to or through the post office at St. Louis, Missouri, by means of the post office establishment of the United States.

And the Grand Jurors, aforesaid, on their oaths aforesaid, do further present: that the services so as aforesaid rendered to the said Rialto Grain and Securities Company, by the said Joseph Burton, Senator, as aforesaid, consisted in part of visits to the said Postmaster General, the Chief Post Office Inspector, and other officers of the post office department of the United States, and of representations and statements made to the said Postmaster General, the said Chief Post Office Inspector, and said other officers, which said visits, representations and
9 statements so as aforesaid made by the said Joseph Ralph Burton, were made with the view and for the pur-

pose of inducing said Postmaster General, the said Chief Post Office Inspector and said other officers to decide the question so as aforesaid pending before said Post Office Department, in a manner favorable to the said Rialto Grain and Securities Company, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Third Count: And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that Joseph Ralph Burton was at all of the times and dates hereinafter mentioned, and now is a member of the Congress of the United States of America, to-wit: a Senator from the State of Kansas, duly elected and chosen by the Legislature of said State of Kansas for a term of six years, expiring on the 4th day of March, A. D. 1907, and was at all of said times duly qualified, admitted and acting as such Senator.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that on the 26th, day of March, A. D. 1903, at the City of St. Louis, in the State of Missouri, and within the Division and District aforesaid, and within the jurisdiction of the Court aforesaid, the said Joseph Ralph Burton, Senator as aforesaid, did unlawfully, knowingly, willfully and corruptly take, accept and receive from one W. D. Mahaney an officer and employe of the Rialto Grain and Securities Company (a corporation) the sum of five hundred dollars, lawful money of the United States, of the value of five hundred dollars (the particular kinds and denominations of which are to the Grand Jurors aforesaid unknown) as compensation for the services of him, the said Joseph Ralph Burton, Senator as aforesaid, theretofore to-wit: on the 22nd day of November, A. D. 1902, and on divers other days between said last mentioned date and the said 26th day of March, A. D. 1903, rendered by him, the said Joseph Ralph Burton, Senator as aforesaid, to the Rialto Grain and Securities Company (a corporation as aforesaid) before the Post Office Department of the United States, in a certain matter then and there pending before said Post Office Department, in which the said United States was directly interested, that is to say: whether the said Rialto Grain and Securities Company had violated the provisions of Section 5480 of the Revised Statutes of the United States, in that, it (said Company) had through its officers, agents and servants devised a scheme and artifice to defraud, which was to be effected by said Rialto Grain and Securities Company, through and by its officers, agents and servants, in opening correspondence and communication with divers persons, resident within the United States, by means of the Post Office establishment of the United

States, and whether said Rialto Grain and Securities Company, by its said officers, agents and servants, in and for executing said scheme and artifice to defraud, had placed or deposited any letter or packet in any post office of the United States, to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance of the authority vested in him by law, to ascertain, find and determine from evidence satisfactory to him, the said Postmaster General, whether he should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain and Securities Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2nd., 1905) any and all letters addressed to said Rialto Grain and Securities Company, and sent to or through the Post Office at St. Louis, Missouri, by means of the Post Office establishment of the United States.

And the Grand Jurors aforesaid, on their oaths aforesaid do further present: that the services so as aforesaid rendered to the said Rialto Grain and Securities Company, by the said Joseph Ralph Burton, Senator, as aforesaid, consisted
11 in part of visits to the said Postmaster General, the Chief Post Office Inspector, and other officers of the Post Office Department of the United States, and of representations and statements made to the said Postmaster General, the said Chief Post Office Inspector, and said other officers, which said visits, representations and statements so as aforesaid made by the said Joseph Ralph Burton, were made with a view and for the purpose of inducing said Postmaster General, the said Chief Post Office Inspector, and said other officers, to decide the question so as aforesaid pending before said Post Office Department, in a manner favorably to the said Rialto Grain and Securities Company, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Fourth Count: And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that Joseph Ralph Burton was at all of the times and dates hereinafter mentioned, and now is a member of the Congress of the United States, of America, to-wit: Senator from the State of Kansas, duly elected and chosen by the Legislature of said State of Kansas for a term of six years, expiring on the 4th day of March, A. D., 1907, and was at all of said times duly qualified, admitted and acting as such Senator.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that on the 26th day of March, A. D. 1903, at the City of St. Louis, in the State of Missouri, and within the Division and District aforesaid, and within the jurisdiction of the court aforesaid, the said Joseph Ralph Burton, Senator as aforesaid, did unlawfully, knowingly, willfully and corruptly take, accept and receive from Hugh C. Dennis, the sum of Five Hundred dollars, lawful money of the United States, of the value of Five hundred dollars (the particular kinds and denominations of which are to the Grand Jurors aforesaid unknown) as compensation for the services of him, the said Joseph Ralph Burton, Senator as aforesaid,
12 theretofore, to-wit: on the 22nd day of November, A. D., 1902, and on divers other days between said last mentioned date and the said 26th day of March, A. D. 1903, rendered by him, the said Joseph Ralph Burton, Senator, as aforesaid, to the Rialto Grain and Securities Company, before the Post Office Department of the United States, in a certain matter then and there pending before said Post Office Department, in which the said United States was directly interested, that is to say: whether the said Rialto Grain and Securities Company had violated the provisions of Section 5480 of the Revised Statutes of the United States, in that it (said company) had through its officers, agents and servants devised a scheme and artifice to defraud, which was to be effected by said Rialto Grain and Securities Company, through and by its officers, agents and servants, in opening correspondence and communication with divers persons resident within the United States, by means of the post office establishment of the United States, and whether said Rialto Grain and Securities Company, by its said officers, agents and servants, in and for executing said scheme and artifice to defraud, had placed or deposited any letter or packet in any post office of the United States, to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance of the authority vested in him by law, to ascertain, find and determine from evidence satisfactory to him, the said Postmaster General, whether he should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain and Securities Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2nd, 1895) any and all letters addressed to said Rialto Grain and Securities Company, and sent to or through the Post Office at St. Louis, Missouri, by means of the post office establishment of the United States.

13 And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that the services so as aforesaid rendered to the said Rialto Grain and Securities Company, by the said Joseph Ralph Burton, Senator, as aforesaid, consisted in part of visits to the said Postmaster General, the Chief Post Office Inspector, and other officers of the Post Office Department of the United States, and of representations and statements made to the said Postmaster General, the said Chief Post Office Inspector, and said other officers, which said visits, representations and statements, so as aforesaid made by the said Joseph Ralph Burton, were made with the view and for the purpose of inducing said Postmaster General, the said Chief Post Office Inspector, and said other officers, to decide the question so as aforesaid pending before said Post Office Department, in a manner favorable to the said Rialto Grain and Securities Company, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Fifth Count. And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that Joseph Ralph Burton was at all of the times and dates hereinafter mentioned, and now is a member of the Congress of the United States of America, to-wit: a Senator from the State of Kansas, duly, elected and chosen by the Legislature of said State of Kansas for a term of six years, expiring on the 4th day of March, A. D., 1907, and was at all of said times duly qualified, admitted and acting as such Senator.

And the Grand Jurors aforesaid, on their oaths aforesaid do further present: that on the 26th day of March, A. D., 1903, at the City of St. Louis, in the State of Missouri, and within the Division and District aforesaid, and within the jurisdiction of the Court aforesaid, the said Joseph Ralph Burton, Senator as aforesaid, did unlawfully, knowingly, willfully and
14 corruptly take, accept and receive from W. D. Mahaney, an employe of Hugh C. Dennis the sum of five hundred dollars, lawful money of the United States, of the value of five hundred dollars (the particular kinds and denominations of which are to the Grand Jurors aforesaid unknown as compensation for the services of him, the said Joseph Ralph Burton, Senator as aforesaid, theretofore, to-wit: on the 22nd day of November, A. D., 1902, and on divers other days between said last mentioned date and the said 26th day of March, A. D., 1903, rendered by him, the said Joseph Ralph Burton, as aforesaid to Hugh C. Dennis before the Post Office Department of the United States, in a certain matter then and there pending before said Post Office Department, in which the said United States was directly interested, that is to say: whether the said

Hugh C. Dennis had violated the provisions of Section 5480 of the Revised Statutes of the United States, in that he, the said Hugh C. Dennis had devised a scheme and artifice to defraud, which was to be effected by him, the said Hugh C. Dennis, in opening correspondence and communication with divers persons resident within the United States, by means of the post office establishment of the United States, and whether the said Hugh C. Dennis in and for executing said scheme and artifice to defraud, had placed or deposited any letters or packet in any post office of the United States, to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance of the authority vested in him by law, to ascertain, find and determine from evidence satisfactory to him, the said Postmaster General, whether he, the said Postmaster General, should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Hugh C. Dennis, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2nd., 1895), any and all letters addressed to the said Hugh C. Dennis, and sent to or through the post office at St. Louis, Missouri, by means of the post office
15 establishment of the United States.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that the services, so as aforesaid, rendered to the said Hugh C. Dennis by the said Joseph Ralph Burton, Senator, as aforesaid, consisted in part of visits to the said Postmaster General, the said Chief Post Office Inspector, and other officers of the Post Office Department of the United States, and of representations and statements made to the said Postmaster General, the said Chief Post Office Inspector, and said other officers, which said visits, representations and statements, so as aforesaid made by the said Joseph Ralph Burton, were made with a view and for the purpoe of inducing said Postmaster General, the said Chief Post Office Inspector, and said other officers to decide the question so as aforesaid pending before said Post Office Department, in a manner favorable to the said Hugh C. Dennis, contrary to the form of the Statutes in such case made and provided and against the peace and dignity of the United States.

16 Sixth Count. And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that Joseph Ralph Burton was at all of the times and dates herein after mentioned, and now is a member of the Congress of the United States of America, to-wit a Senator from the State of Kansas, duly elected and chosen by the Legislature of said State of

Kansas for a term of six years, expiring on the 4th day of March, A. D., 1907, and was at all of said times duly qualified, admitted and acting as such Senator.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that on the 22nd day of November, A. D., 1902, at the City of St. Louis, in the State of Missouri, and within said Division and District aforesaid, and within the jurisdiction of the Court aforesaid, the said Joseph Ralph Burton, Senator, as aforesaid, did unlawfully, knowingly, willfully and corruptly, take, accept and receive a certain check for the payment of money, for the sum of five hundred dollars, which said check bore date November 22, 1902, and was made and drawn by the Rialto Grain and Securities Company, by Hugh C. Dennis, Treasurer, President, upon the Commonwealth Trust Company of St. Louis, payable to the order of the said Joseph Ralph Burton, by the name of J. R. Burton, and by the said Joseph Ralph Burton, by the name of J. R. Burton duly endorsed, and then and there by the said Commonwealth Trust Company, paid in lawful money of the United States to the said Joseph Ralph Burton, as compensation for the services of him, the said Joseph Ralph Burton, Senator as aforesaid, theretofore, to-wit: on the 22nd day of November, A. D. 1902, and on divers other days between said last mentioned date and the said 26th day of March, A. D., 1903, rendered by him, the said Joseph Ralph Burton, Senator, as aforesaid, to the said Rialto Grain and Securities Company (a corporation duly organized under the laws of the State of Missouri) before the Post Office De-
17 partment of the United States, in a certain matter then and there pending before said Post Office Department, in which the said United States was directly interested, that is to say: whether the said Rialto Grain and Securities Company had violated the provisions of Section 5480 of the Revised Statutes of the United States, in that it (said Company) had through its officers, agents and servants devised a scheme and artifice to defraud, which was to be effected by said Rialto Grain and Securities Company, through and by its officers agents and servants, in opening correspondence and communication with divers persons resident within the United States, by means of the Post Office establishment of the United States, and whether said Rialto Grain and Securities Company, by its said officers, agents and servants, in and for executing said scheme and artifice to defraud, had placed or deposited any letter or packet in any post office of the United States, to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance of the authority vested in him by law, to ascertain, find and determine from evidence satisfactory to him, the said Postmaster General, whether he,

the said Postmaster General should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain and Securities Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2nd., 1895) any and all letters addressed to said Rialto Grain and Securities Company, and sent to or through the Post Office at St. Louis, Missouri, by means of the Post Office establishment of the United States.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that the services so as aforesaid rendered to
18 the said Rialto Grain and Securities Company, by the said Joseph Ralph Burton, Senator, as aforesaid, consisted in part of visits to the said Postmaster General, the Chief Post Office Inspector, and other officers of the Post Office Department of the United States, and of representations and statements made to the said Postmaster General, the said Chief Post Office Inspector, and said other officers, which said visits, representations and statements so as aforesaid made by the said Joseph Ralph Burton, were made with the view and for the purpose of inducing said Postmaster General, the said Chief Post Office Inspector, and said other officers, to decide the question so as aforesaid pending before said Post Office Department, in a manner favorable to the said Rialto Grain and Securities Company, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Seventh Count: And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that Joseph Ralph Burton was at all of the times and dates hereinafter mentioned and now is a member of the Congress of the United States of America, to-wit: a Senator from the State of Kansas, duly elected and chosen by the Legislature of said State of Kansas for a term of six years, expiring on the 4th day of March, A. D., 1907, and was at all of said times duly qualified, admitted and acting as such Senator.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that on the 15th day of December, A. D., 1902, at the City of St. Louis, in the State of Missouri, and within said Division and District aforesaid, and within the jurisdiction of the Court aforesaid, the said Joseph Ralph Burton, Senator, as aforesaid, did unlawfully, knowingly, wilfully and corruptly, take, accept and receive a certain check for the payment of money, for the sum of five hundred

dollars, which said check bore date December 15th 1902, and was made and drawn by the Rialto Grain and Securi-
19 ties Company, by Hugh C. Dennis, President, upon the Commonwealth Trust Company of St. Louis, payable to the order of said Joseph Ralph Burton, by the name of J. R. Burton, and by the said Joseph Ralph Burton, by the name of J. R. Burton, duly endorsed, and then and there by the said Commonwealth Trust Company paid in lawful money of the United States to the said Joseph Ralph Burton, as compensation for the services of him, the said Joseph Ralph Burton, Senator as aforesaid, theretofore, to-wit: on the 22nd day of November, A. D., 1902, and on divers other days between said last mentioned date and the said 26th day of March, A. D., 1903, rendered by him, the said Joseph Ralph Burton, Senator, as aforesaid, to the said Rialto Grain and Securities Company (a corporation duly organized under the laws of the State of Missouri) before the Post Office Department of the United States, in a certain matter then and there pending before said Post Office Department, in which the said United States was directly interested, that is to say: whether the said Rialto Grain and Securities Company had violated the provisions of Section 5480 of the Revised Statutes of the United States, in that it (said Company) had through its officers, agents and servants devised a scheme and artifice to defraud, which was to be effected by said Rialto Grain and Securities Company, through and by its officers, agents and servants, in opening correspondence and communication with divers persons resident within the United States, by means of the Post Office Establishment of the United States, and whether said Rialto Grain and Securities Company, by its said officers, agents and servants, in and for executing said scheme and artifice to defraud, had placed or deposited any letter or packet in any post office of the United States, to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance of the authority vested in him by law, to ascer-
20 tain, find and determine from evidence satisfactory to him, the said Postmaster General, whether he, the said Postmaster General, should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain and Securities Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2nd., 1895) any and all letters addressed to said Rialto Grain and Securities Company, and sent to or through the Post office at St. Louis, Missouri, by means of the Post Office establishment of the United States.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that the services so as aforesaid rendered to the said Rialto Grain and Securities Company, by the said Joseph Ralph Burton, Senator, as aforesaid, consisted in part of visits to the said Postmaster General, the Chief Post Office Inspector, and other officers of the Post Office Department of the United States, and of representations and statements made to the said Postmaster General, the said Chief Post Office Inspector, and said other officers, which said visits, representations and statements so as aforesaid made by the said Joseph Ralph Burton, were made with the view and for the purpose of inducing said Postmaster General, the said Chief Post Office Inspector, and said other officers, to decide the question so as aforesaid pending before said Post Office Department, in a manner favorable to the said Rialto Grain and Securities Company, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Eighth Count: And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that Joseph Ralph Burton was at all of the times and dates hereinafter mentioned, and now is a member of the Congress of the United States of America, to-wit: a Senator from the State of Kansas,
21 duly elected and chosen by the Legislature of said State of Kansas for a term of six years, expiring on the 4th day of March, A. D., 1907, and was at all of said times duly qualified, admitted and acting as such Senator.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that on the 22nd day of January, A. D. 1903, at the City of St. Louis, in the State of Missouri, and within said Division and District aforesaid, and within the jurisdiction of the Court aforesaid, the said Joseph Ralph Burton, Senator as aforesaid, did unlawfully, knowingly, willfully and corruptly, take, accept and receive a certain check for the payment of money, for the sum of five hundred dollars, which said check bore date of January 22nd 1903, and was made and drawn by the Rialto Grain and Securities Company, by Hugh C. Dennis, President, upon the Commonwealth Trust Company, of St. Louis, payable to the order of the said Joseph Ralph Burton, by the name of J. R. Burton, and by the said Joseph Ralph Burton, by the name of J. R. Burton, duly endorsed, and then and there by the said Commonwealth Trust Company paid in lawful money of the United States to the said Joseph Ralph Burton, as compensation for the services of him, the said Joseph Ralph Burton, Senator as aforesaid, theretofore, to-wit: on the 22nd day of November, A. D., 1902, and on divers other days between said last mentioned date

and the 26th day of March, A. D., 1903, rendered by him, the said Joseph Ralph Burton, Senator, as aforesaid, to the said Rialto Grain and Securities Company (a corporation duly organized under the laws of the State of Missouri) before the Post Office Department of the United States, in a certain matter then and there pending before said Post Office Department, in which the said United States was directly interested, that is to say: whether the said Rialto Grain and Securities Company had violated the provisions of Section 5480 of the Revised Statutes of the United States, in that it (said Company) had through its officers, agents and servants devised a
22 scheme and artifice to defraud, which was to be effected by said Rialto Grain and Securities Company, through and by its officers, agents and servants, in opening correspondence and communication with divers persons resident within the United States, by means of the Post Office establishment of the United States, and whether said Rialto Grain and Securities Company, by its said officers, agents and servants, in and for executing said scheme and artifice to defraud, and placed or deposited any letter or packet in any post office of the United States, to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance of the authority vested in him by law, to ascertain, find and determine from evidence satisfactory to him, the said Postmaster General, whether he, the said Postmaster General should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain and Securities Company, but to return with the word "Fraudulent" Plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2nd., 1895) any and all letters addressed to said Rialto Grain and Securities Company, and sent to or through the Post Office at St. Louis, Missouri, by means of the Post Office establishment of the United States.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present; that the services so as aforesaid rendered to the said Rialto Grain and Securities Company, by the said Joseph Ralph Burton, Senator, as aforesaid, consisted in part of visits to the said Postmaster General, the Chief Post Office Inspector, and other officers of the Post Office Department of the United States, and of representations and statements made to the said Postmaster General, the said Chief Post Office Inspector, and, said other officers, which said visits, representations and statements so as aforesaid made by the said
23 Joseph Ralph Burton, were made with the view and for the purpose of inducing said Postmaster General, the said Chief Post Office Inspector, and said other officers, to decide

the question so as aforesaid pending before said Post Office Department, in a manner favorable to the said Rialto Grain and Securities Company, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Ninth Count. And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that Joseph Ralph Burton was at all of the times and dates hereinafter mentioned, and now is a member of the Congress of the United States of America, to-wit: a Senator from the State of Kansas, duly elected and chosen by the Legislature of said State of Kansas for a term of six years, expiring on the 4th day of March, A. D., 1907, and was at all of said times duly qualified, admitted and acting as such Senator.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present; that on the 16th day of February, A. D., 1903, at the City of St. Louis, in the State of Missouri, and within said Division and District aforesaid, and within the jurisdiction of the Court aforesaid, the said Joseph Ralph Burton, Senator, as aforesaid, did unlawfully, knowingly, willfully and corruptly, take, accept and receive a certain check for the payment of money, for the sum of five hundred dollars, which said check bore date February 16th, 1903, and was made and drawn by the Rialto Grain and Securities Company, by W. D. Mahaney, Vice President, upon the Commonwealth Trust Company of St. Louis, payable to the order of the said Joseph Ralph Burton, by the name of J. R. Burton, and by the said Joseph Ralph Burton, by the name of J. R. Burton, duly endorsed, and then and there by the said Commonwealth Trust Company paid in lawful money of the United States to the said Joseph Ralph Burton, as compensation for the services of him, the said Joseph
24 Ralph Burton, Senator as aforesaid, theretofore, to-wit: on the 22nd day of November, A. D., 1902, and on divers other days between said last mentioned date and the said 26th day of March, A. D., 1903, rendered by him, the said Joseph Ralph Burton, Senator, as aforesaid, to the said Rialto Grain and Securities Company (a corporation duly organized under the laws of the State of Missouri) before the Post Office Department of the United States in a certain matter then and there pending before said Post Office Department, in which the said United States was directly interested, that is to say: whether the said Rialto Grain and Securities Company had violated the provisions of Section 5480 of the Revised Statutes of the United States, in that it (said Company) had through its officers, agents and

servants devised a scheme and artifice to defraud, which was to be effected by said Rialto Grain and Securities Company, through and by its officers, agents and servants, in opening correspondence and communication with divers persons resident within the United States, by means of the Post Office establishment of the United States, and whether said Rialto Grain and Securities Company, by its said officers, agents and servants, in and for executing said scheme and artifice to defraud, had placed or deposited any letter or packet in any post office of the United States, to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance of the authority vested in him by law, to ascertain, find and determine from evidence satisfactory to him, the said postmaster General, whether he, the said Postmaster General, should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain and Securities Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2nd, 1895), any and all letters
25 addressed to said Rialto Grain and Securities Company, and sent to or through the Post Office at St. Louis, Missouri, by means of the Post Office establishment of the United States.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: that the services so as aforesaid rendered to the said Rialto Grain and Securities Company, by the said Joseph Ralph Burton, Senator, as aforesaid, consisted in part of visits to the said Postmaster General, the Chief Post Office Inspector, and other officers of the Post Office Department of the United States, and of representations and statements made to the said Postmaster General, the said Chief Post Office Inspector, and said other officers, which said visits, representations and statements so as aforesaid made by the said Joseph Ralph Burton, were made with the view and for the purpose of inducing said Postmaster General, the said Chief Post Office Inspector, and said other officers, to decide the question so as aforesaid pending before said Post Office Department, in a manner favorable to the said Rialto Grain and Securities Company, contrary to the form of the statute in such case made and provided against the peace and dignity of the United States.

DAVID P. DYER,
United States Attorney.

Indorsed: No. 4992. United States District Court, Eastern Division, Eastern District of Missouri. The United States vs. Joseph Ralph Burton. Indictment for Violation of Sec. 1782

R. S. U. S. A true bill, Edw. L. Preetorius, Foreman Grand Jury. Filed January 23rd, 1904. James R. Gray, Clerk.

And afterwards, at said November Term, 1903, of said
27 Court, the following proceedings were had and appear of record in said cause, to-wit:

Wednesday, January 27th, 1904.

The United States, Plaintiff,
4992. vs.
Joseph Ralph Burton, Defendant.

Indictment for Violation of Section 1782 of the Revised Statutes of the United States.

This day comes the United States by District Attorney and the said defendant being present in Court in person and also appearing by Chester H. Krum, Esquire, his attorney, and on Motion of the District Attorney, it is Ordered that he the said defendant be arraigned upon the Indictment herein against him and thereupon the said defendant waives the reading of the said Indictment and formal arraignment thereon and pleads Not guilty to the charges as contained in the said Indictment.

And on the application of the said defendant, It is Ordered that he be allowed to give bail for his appearance herein, the amount of such bail being fixed by the Court at the sum of ($5000.00) Five Thousand dollars.

And thereupon the said Joseph Ralph Burton as principal and Ernest H. Kastor, George W. Davis, and Herbert A. Vrooman, as Sureties personally appeared in open Court and acknowledged themselves to owe and be indebted to the United States of America in the sum of ($5000.00) Five thousand dollars to be levied of their respective goods and chattels, lands and tenements, and to the said United States of America rendered; conditioned however to be void if the said defendant Joseph Ralph Burton shall personally appear at and before this Court on the Seventh day of March, next, A. D., 1904, then and there to answer to the charges as contained in the said
28 Indictment herein against him, and if he shall appear from day to day thereafter, and from time to time, or at any time, at any future term, or day of the term of this Court, as may be Ordered by said Court until discharged upon the said Indictment and further, if he, the said defendant shall then and there obey any and all Orders which may be made by said Court in relation to said Indictment during the pending of the same, and not depart from said Court without leave thereof.

Tuesday, February 9th, 1904.

The United States, Plaintiff,
4992. vs.
Joseph Ralph Burton, Defendant.

Indictment for Violation of Section 1782 of the Revised Statutes of the United States.

This day comes the United States by District Attorney and On Motion of the said Attorney, It is Ordered that the said defendant appear at and before this Court on Tuesday, March 22nd, instead of Monday, March 7, 1904, as heretofore Ordered on January 27th, 1904, and that this cause be set for trial on Tuesday March 22nd, 1904.

Saturday, February 13th, 1904.

The United States, Plaintiff,
4992. vs.
Joseph Ralph Burton, Defendant.

Indictment for Violation of Section 1782 of the Revised Statutes of the United States.

This day comes the United States, by District Attorney, and the said defendant being present in Court in compliance with the recognizance heretofore entered into by him in this cause and also appearing by Chester H. Krum and Fred W. Lehman, Esquire, his attorneys, the said defendant withdraws as of February 11th, (1904) nunc protunc his plea of Not guilty theretofore entered by him in this cause on January 27th last (1904)

And the demurrer filed in this cause on February 11th, last (1904) having been taken up the same is thereupon
29 argued by counsel and submitted to the Court and the Court not being fully advised of and concerning the same, takes further time within which to consider of its judgment thereon.

The said demurrer filed as aforesaid is in the words and figures as follows, to-wit:

In the District Court of the United States, Eastern Division, Eastern District of Missouri.

United States
vs.
Joseph Ralph Burton.

Demurrer to Indictment.

The defendant demurs to the indictment and each and every count thereof and says that neither of said counts is sufficient in law to require him to answer thereto and as grounds of said

demurrer, the defendant says, that neither count states facts showing that at any time, there was a matter or thing in which the United States was directly or indirectly interested, pending in the Post Office Department; that whether an order to stamp mail fraudulent shall be made is not a matter in which the United States is interested; that the Postmaster General had no authority to make an order upon the facts stated and had no jurisdiction in the premises; that the interest of the United States is a matter pending before a Department which renders the statute operative is either a pecuniary, or property interest, which may be favorably or unfavorably affected by action sought or taken in the given matter pending before the Department; that the matter or thing covered by the statute is one of controversy, claim, or asserted right as against the United States, or in its behalf by whose result the property, or pecuniary interests of the United States may be affected.

Wherefore defendant prays judgment, etc.

CHESTER H. KRUM,
BOYLE, PRIEST & LEHMAN,
For Defendant.

And afterwards the following further proceedings were had and appear of record in said cause, to-wit:

29a Tuesday, February 16th, 1904.

The United States, Plaintiff,
4992. vs.
Joseph Ralph Burton, Defendant.

Indictment for Violation of Section 1782 of the Revised Statutes of the United States

This day comes the United States by District Attorney and the said defendant being present in Court in compliance with the recognizance heretofore entered into by him in this cause and also appearing by Chester H. Krum, and Fred W. Lehman, Esquires, his attorneys, and the Court having considered the questions of law arising upon the said demurrer, and being fully advised of and concerning the same, is of opinion that the law on said demurrer is for the said plaintiff and in accordance with such opinion Now Orders that the said demurrer be, and the same is hereby overruled.

Tuesday, March 22nd, 1904.

The United States, Plaintiff,
4992. vs.
Joseph Ralph Burton, Defendant.

Indictment for Violation of Section 1782 of the Revised Statutes of the United States.

This day comes the United States, by District Attorney, and the said defendant being present in court in compliance with the recognizance heretofore entered into by him in this cause and also appearing by Chester H. Krum and Fred W. Lehman, Esquires, his attorneys, and the said District Attorney says that he will Not further prosecute the said defendant upon the fourth (4th) and fifth (5th) counts of the Indictment herein against him, and asks that the said Indictment as to said Fourth (4th) and fifth (5th) counts be now dismissed.

It is therefore, Now considered by the Court, that
30 the Indictment in this cause, so far as the same relates to the fourth (4th) and fifth (5th) counts therein contained, be, and the same is hereby now dismissed, and that the said defendant, Joseph Ralph Burton, be released and discharged from further prosecution upon the said (4th) fourth and (5th) fifth counts of said Indictment and that as to said counts he go hence without day & C.

And thereupon the said defendant waives the reading of the said Indictment and formal arraignment thereon and pleads Not guilty to the charges as contained in the said Indictment.

And this cause being regularly called for trial and both parties being ready for trial, a Stipulation of parties as to certain facts is filed. And on Motion of the District Attorney It is Ordered that a jury come and thereupon come said jury, to-wit: E. F. Rippstein, E. S. Purdy, James Bowers, A. E. Dann, M. F. Brown, A. E. Ford, A. P. Behrens, Charles F. Bates, Charles W. Wall, Albert B. Groves, William H. Steele, and Edward B. Lansing, twelve good and lawful men who were duly sworn well and truly to try and true deliverance make between the United States and the said defendant upon the Indictment herein, and thereupon the testimony of witnesses is in part heard but the hearing not being concluded at the hour of adjournment, It is Ordered that the further hearing thereof, and further proceedings herein be continued until to-morrow morning.

Ordered That the Marshal furnish Meals and Lodging for the jury during the trial of this cause and that said jury be not allowed to separate during said trial and that said Meals and Lodging be furnished at the cost of the United States.

Wednesday, March 23rd, 1904.

The United States, Plaintiff,
4992. vs.
Joseph Ralph Burton, Defendant.

Indictment for Violation of Section 1782 of the Revised Statutes of the United States.

This day comes the United States, By District Attor-
31 ney and the said defendant being present in Court in compliance with the recognizance heretofore entered into by him in this cause and also appearing by Chester H. Krum and Fred W. Lehman, Esquires, his attorneys and the jury sworn in this cause being also present, and the trial of this cause having been resumed, the testimony of witnesses is further heard but the hearing not being concluded at the hour of adjournment, It is Ordered that the further hearing thereof, and further proceedings herein be continued until to-morrow morning.

Thursday, March 24th, 1904.

The United States, Plaintiff,
4992. vs.
Joseph Ralph Burton, Defendant.

Indictment for Violation of Section 1782 of the Revised Statutes of the United States.

This day comes again the United States by District Attorney, and the said defendant being present in Court in compliance with the recognizance heretofore entered into by him in this cause and also appearing by Chester H. Krum, and Fred W. Lehman, Esquires, his attorneys and the jury sworn in this cause being also present, and the trial of this cause having been again resumed the testimony of witness is further heard but the hearing not being concluded at the hour of adjournment, It is Ordered that the further hearing thereof and further proceedings herein be continued until to-morrow morning.

Friday, March 25th, 1904.

The United States, Plaintiff,
4992. vs.
Joseph Ralph Burton, Defendant.

Indictment for Violation of Section 1782 of the Revised Statutes of the United States.

This day comes again the United States by District Attorney, and the said defendant being present in Court in compliance

with the recognizance heretofore entered into by him in this cause, and also appearing by Chester H. Krum and Fred
32 W. Lehman, Esquires, his attorneys and the jury sworn in this cause being also present, and the trial of this cause having been again resumed the testimony of witnesses is further heard but the hearing not being concluded at the hour of adjournment, It is Ordered that the further hearing thereof and further proceedings herein be continued until to-morrow morning.

Saturday, March 26th, 1904.

The United States, Plaintiff,
4992. vs.
Joseph Ralph Burton, Defendant.

Indictment for Violation of Section 1782 of the Revised Statutes of the United States.

This day comes again the United States by District Attorney, and the said defendant being present in Court in compliance with the recognizance heretofore entered into by him in this cause and also appearing by Chester H. Krum and Fred W. Lehman, Esquires, his attorneys, and the jury sworn in this cause being also present and the trial of this cause having been again resumed, the testimony of witnesses is further heard and said testimony being concluded, the said jury after hearing the arguments of Counsel and after receiving instructions from the Court, retire to consider of the Verdict to be rendered herein.

Monday, March 28th, 1904.

The United States, Plaintiff,
4992. vs.
Joseph Ralph Burton, Defendant.

Indictment for Violation of Section 1782 of the Revised Statutes of the United States.

This day comes the United States, by District Attorney, and the said defendant being present in Court in compliance with the recognizance heretofore entered into by him in this cause and also appearing by Chester H. Krum and Fred W. Lehman, Esquires, his attorneys, and the jury sworn in this cause return into Court the following Verdict, to-wit:

33 "We the jury in the above entitled cause find the defendant guilty as charged in Counts One (1) two (2) Six (6) Seven (7) Eight (8) and Nine (9) of the Indictment, and Not guilty as charged in Count three (3) C. W. Wall, Foreman."

And thereupon the said defendant by his said attorneys files his Motion for a New trial of this cause, and it is Ordered that the said defendant appear at and before this Court on to-morrow at ten o'clock in the forenoon and from day to day thereafter in obedience to the recognizance heretofore entered into by him in this cause.

Tuesday, March 29th, 1904.

The United States, Plaintiff,
4992. vs.
Joseph Ralph Burton, Defendant.

Indictment for Violation of Section 1782 of the Revised Statutes of the United States.

This day comes the defendant, by Chester H. Krum and Fred W. Lehman, Esquires, his attorneys and files his motion in arrest of judgment in this cause.

Wednesday, April 6th, 1904.

The United States, Plaintiff,
4992. vs.
Joseph Ralph Burton, Defendant.

Indictment for Violation of Section 1782 of the Revised Statutes of the United States.

This day comes the United States by District Attorney and the said defendant being present in Court in compliance with the recognizance heretofore entered into by him in this cause and also appearing by Chester H. Krum, Esquire his attorney, the Motion for a New Trial and the Motion in arrest of Judgment heretofore filed by the defendant in this cause having been taken up the same are argued by Counsel and submitted to the court and the court having considered said Motion and being fully advised of and concerning the same It is Ordered that the said Motions be and the same are hereby Overruled.

And thereupon the said District Attorney asks the
34 judgment and sentence of the Court upon the Verdict of guilty heretofore returned by the jury to the charges as contained in the first, second, Sixth, Seventh, eighth, and Ninth counts of the Indictment herein and the said defendant having nothing further to say after demand made of him why such judgment and sentence should Not be so rendered:

It is therefore Now considered by the Court, and as the judgment and sentence of the Court upon the said Verdict of guilty so returned by the jury in this cause, that he, the said defendant, Joseph Ralph Burton, make his fine to the United States of America by the payment of the sum of ($2500.00)

Twenty-five hundred dollars and also the costs of the prosecution to be taxed and that he, the said defendant be confined and imprisoned in the Iron County Jail at Ironton, State of Missouri, for and during the term of (6) Six Months.

And the Marshal of the United States, in and for the said Eastern District of Missouri, is hereby directed to deliver the said prisoner, together with a duly certified copy of this Judgment and sentence to the Jailer of said Iron County Jail.

And thereupon the said defendant Joseph Ralph Burton by Chester H. Krum, Esquire, his attorney, tenders a bill of Exceptions which is allowed, signed, sealed and Ordered to be made a part of the record herein.

And the said defendant herein files his assignment of Errors and his Petition for a Writ of Error to the United States Circuit Court of Appeals Eighth Circuit, from the judgment and sentence rendered herein against him, which petition is granted and a citation, citing and admonishing the said plaintiff to be and appear at said Circuit Court of Appeals sixty days from this date is signed by the Judge.

35 And it is further Ordered that upon the said defendant Joseph Ralph Burton giving a bond in the penal sum of Ten Thousand dollars ($10,000.00) conditioned as required by law and with sureties to be approved by the Court, a supersedeas be awarded staying said judgment and sentence as to him and thereupon the said defendant Joseph Ralph Burton presents a bond in the said sum of Ten Thousand dollars ($10,000.00) with Ernest H. Kastor, George W. Davis, and Herbert A. Vrooman as sureties which bond is approved by the Court and Ordered filed.

Which said Bill of Exceptions, assignment of Errors, petition for a writ of error and bond are respectively in words and figures as follows, to-wit:

36 Bill of Exceptions.

In the United States District Court in and for the Eastern Division of the Eastern District of Missouri.

State of Missouri,
City of St. Louis—ss.

The United States of America,
vs.
Joseph Ralph Burton.

Be it Remembered, That upon the trial of this cause during the March Term, 1904, of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Mis-

souri, upon the 22nd, 23rd, 24th, 26th, 27th, and 28th days of March, A. D., 1904 before the Honorable Elmer B. Adams, Judge of said District Court of the United States, and a jury, the following further proceedings were had and evidence introduced.

The United States was represented in the trial of said cause by Col. D. P. Dyer, United States District Attorney, and Messrs Bert D. Nortoni and Horace Dyer, assistant United States District Attorneys; the Defendant, Joseph Ralph Burton, being represented by Messrs. Chester H. Krum and F. W. Lehmann.

Judge Krum: The defendant asks for a larger number of jurors than are now called, for the purposes of peremptory challenges on the ground that while the offense is designated in the Statute as a misdemeanor, it is, nevertheless, an infamous offense under the rulings of the Supreme Court of the United States.

The Court: My judgment is that this is a misdemeanor, pure and simple, and that the challenges should be limited to
37 three on each side.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Col. Dyer: Before the jury is sworn, I desire to enter a nolle prosequi as to the fourth and fifth counts of this Indictment.

The Court: That may be done.

The jury, having been empaneled and sworn, the government offered evidence as follows:

Col. D. P. Dyer, United States District Attorney, made the opening statement on behalf of the Government to the jury, to which Judge Chester M. Krum, counsel for defendant, replied.

Col. Dyer: We will offer formal proof that has been admitted—that is, a stipulation may be introduced in reference to the matter so as to avoid the introduction of other testimony.

Judge Krum: Perhaps it would be preferable, your honor, if the defendant would admit, as Col. Dyer and I have stipulated.

The Court: Take it as it comes along on the different phases of the evidence, and if it is admitted, you can so indicate.

Col. Dyer: It is admitted that the defendant, Joseph Ralph Burton, was at the times mentioned in indictment No. 4192, and is now, a member of the Congress of the United States of America, to wit: a Senator from the State of Kansas, duly elected and chosen by the Legislature of the State of Kansas for a term of six years expiring on the 4th day of March, 1907,

and was, at all of said times, duly qualified and admitted to act as such Senator.

38 Judge Krum: That is admitted.

Col. Dyer: The Government offers in evidence the articles of incorporation of the Rialto Grain and Securities Company.

Judge Krum: We will admit the incorporation of the Rialto Grain and Securities Company, but would like to have the articles of association read—I mean as to the purposes of the organization of the corporation.

Counsel for the United States here read the Articles of Incorporation of the Rialto Grain and Securities Company, the same being in words and figures as follows, to-wit:

39 State of Missouri.

Department of State.

To All to Whom These Presents Shall Come:

I, Samuel B. Cook, Secretary of State of the State of Missouri and Keeper of the Great Seal thereof, hereby certify that the annexed pages contain a full, true and complete copy of ..... Articles of Association of the Rialto Grain and Securities Company, filed Sept. 5th, 1902. .....
.....
.....
as the same appears on file ..... in this office.
[Seal]

In Testimony Whereof, I hereunto set my hand and affix the Great Seal of the State of Missouri.

Done at the City of Jefferson, this 9th day of March, A. D., 1904.

SAMUEL B. COOK,
Secretary of State.

St. Louis, Mo., Sept. 2, 1902.

Know All Men By These Presents:

That we, whose names are hereunto subscribed, do hereby associate ourselves together for the purpose of forming a corporation under the provisions of the laws of the State of Missouri, Chapter XII, Article IX, Revised Statutes of 1899, and for that purpose state:

First: The name of the corporation shall be Rialto Grain and Securities Company.

Second: The principal office of this corporation shall be located in the City of St. Louis and State of Missouri.

40 Third: The capital stock of this corporation is Twenty-five Thousand Dollars (25000.00), divided into two hundred and fifty (250) shares of the par value of One Hundred Dollars ($100.00) each; the same has been bona fide subscribed and is full paid up in lawful money of the United States and is in the custody of the persons herein after named as the first Board of Directors.

Fourth: The names and places of residence of the several shareholders and the number of shares subscribed by each are as follows:

Names.	Residence.	No. of shares.
Joseph S. Lightholder,	St. Louis, Missouri,	200
H. D. Nisbet,	St. Louis, Missouri,	1
Lawrence Talley,	St. Louis, Missouri,	47
C. A. Smith,	St. Louis, Missouri,	1
Frank A. C. MacMannus,	St. Louis, Missouri,	1

Fifth: The business of this corporation shall be managed by a Board of Directors composed of five (5) directors, and the following named shareholders shall constitute the Board of Directors of this corporation for the first year: Joseph S. Lightholder, H. D. Nisbet, Lawrence Talley, C. A. Smith, Frank A. C. McManus.

Sixth: This corporation shall continue as a body corporate for the term of fifty (50) years.

Seventh: The purposes for which this corporation is formed are to buy, sell and deal in all kinds of grain, seeds, cereals, provisions, cotton and bonds and securities of all kinds except stocks of other corporations on its own account or acting as agents for others, to do a general brokerage business, to own real estate, and to buy, sell and deal in same on its own account or for others, to build, lease, own operate and
41 control elevators and warehouses in the State of Missouri or elsewhere, to do a general merchandise business and to do generally whatever may be necessary to carry on its business.

Eighth: The first meeting of the stockholders of this corporation for the purpose of adopting by-laws and for the transaction of any other business which may be brought before them will be held at the office of the company in the City of St. Louis on the 5th day of September, 1902, at nine o'clock a. m.

In Witness of all of which the said parties have hereto set their hands and hereunto affixed their seals this 2nd day of September, A. D., 1902.

JOSEPH S. LIGHTHOLDER, [Seal]
H. D. NISBET, [Seal]
LAWRENCE TALLY, [Seal]
FRANK A. C. MACMANUS, [Seal]
C. A. SMITH, [Seal]

State of Missouri,
City of St. Louis—ss.

On this 2nd day of September, 1902, before me personally appeared Joseph S. Lightholder, H. D. Nisbett, Lawrence Tally, C. A. Smith and Frank A. C. MacManus, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they severally executed the same as their free act and deed.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of St. Louis, Missouri, the day and year above written.

Copy of Seal.
William McNamee,
Notary Public
City of St. Louis, Mo.

WM. McNAMEE,
Notary Public.

My term expires July 23rd, 1903.

42 Filed and recorded September 4th, 1902, at 10:47 A. M.
WM. H. HAHN, Recorder.

State of Missouri,
City of St. Louis—ss.

I, the undersigned Recorder of Deeds for said City and State, do hereby certify the foregoing to be a true copy of the articles of incorporation of the Rialto Grain and Securities Company, together with the acknowledgement and date of filing and recording thereof, as the same remains of record in my office in Book of Corporations No. 19, page 543.

In Witness Whereof, I have hereunto set my hand and official seal this 4th day of September, A. D., 1902

[Seal] WM. H. HAHN, Recorder.

Filed and certificate of incorporation issued Sep. 5, 1902.
SAM B. COOK,
Secretary of State.

Col. Dyer: The law upon the subject and the Statute—of course the court will take judicial notice of that, but in that connection I would like to offer in evidence and read the rules

and regulations of the Post Office Department, and also the regulations authorizing the Post Master General to appoint inspectors.

Counsel for the United States here read Sections 34, 42, 43, 44 and 45, as found on pages 42, 43, 45, 46, and 47 of the Postal Laws and Regulations, the same being in words and figures as follows, to-wit:

43 Sec. 34. (The Postmaster-General may appoint) fifteen (post-office) inspectors in charge of divisions at (sal-ry of) two thousand five hundred dollars per annum (each) without per diem, fifteen inspectors at two thousand two hundred and fifty dollars per annum (each) without per diem; and fifteen inspectors at two thousand dollars per annum (each) without per diem.

Note. * * * * *

Sec. 43. Post-office inspectors are under the direction of the Fourth Assistant Postmaster-General, and subject to the immediate control of the Chief Post-Office Inspector (see Sec. 20), who is charged with the assignment to duty and general direction of the force and the supervision of all matters pertaining to this branch of the service.

2. The service is organized into sixteen divisions each in charge of an inspector in charge, who will direct the work of the inspectors assigned to his division. All communications must be addressed and sent to the inspector in charge, and through him all orders will be given, unless, to save time in special cases, they are communicated directly from the Department by the Postmaster-General, Fourth Assistant Postmaster-General, or Chief Inspector, in which event the inspector in charge will be notified.

3. The headquarters of the several Divisions of the post-office inspectors are as follows:

* * * * *

g. For the division embracing the States of Missouri (except the city of Kansas City), Iowa, and Arkansas: St. Louis, Mo.

Sec. 44. Post-office inspectors are the special representatives of the Post-master General. They are charged with the investigation of post-offices and all matters connected with the postal service, and with keeping the Department ad-
44 vised as to the condition and needs of the service. Alleged violations of law are to be investigated and reported upon by them, and they will, when necessary, aid in the prosecution of all criminal offenses.

2. Post-masters, clerks, employees, contractors, and others connected with the postal service are subordinate to post-office inspectors with acting within the scope of their duty and employment. But no arbitrary power is hereby conferred upon them. They are not to interfere with any officer or employee who is in the proper discharge of his duty further than to examine his methods, system and accounts, or any complaints which may be made against him. Nor are they to interfere with the mails or the transportation thereof, except as expressly authorized by law, and as permitted by the regulations.

3. Inspectors are intrusted with keys to the several mail locks in use, and are empowered to open and examine mails whenever and wherever they may find it necessary. They are authorized to enter and inspect post-offices at all times and to make such other inquiries and investigations as the interest of the service may demand.

4. Commissions are issued by the Postmaster-General to all inspectors, and they are required to exhibit them as evidence of their authority.

Sec. 45. Special regulations for the instruction and government of inspectors are prescribed in the book of instructions, which is confidentially furnished to each inspector. Obedience and conformity to these regulations and the strict preservation of their secrecy are enjoined.

Col. Dyer: Later on where authority is given to the Post Master General to issue other instructions which are given officially to the Post Office inspectors, I shall have to
45 ask for them and examine the inspectors. I do not think they are covered by the stipulation.

Mrs. Bella Evans a witness of lawful age, being duly produced, sworn and examined on the part of the United States, testified as follows:

Direct Examination

By Col. D. P. Dyer:

Q. Will you state to the jury, if you please, madam, your name in full? A. Mrs. Bella Evans.

Q. Where do you reside? A. Albany.

Q. New York? A. New York.

Q. How long have you lived in Albany? A. Fourteen years.

Q. I show you a letter dated Albany, N. Y., October 28th, 1902, and ask you to state to the Jury whether you wrote that letter? A. I did.

Q. And was that letter mailed by you? A. It certainly was.

Q. Do you know Mrs. K. C. Hout? A. Yes, sir.
Q. Where does she reside? A. At present?
Q. Does she reside in the city of Albany also? A. Yes, sir.
Q. At the time the letter I have shown you was written, on October 28, 1902, did Mrs. Hout and yourself live at the same place? A. Yes sir.
Q. Do you know her writing? A. Yes sir.
Q. Look at this letter I now show you, which is dated Albany, New York, October 30, 1902, and state whether this is in the handwriting of Mrs. Hout? A. (After examining letter): Yes sir.

Col. Dyer: I offer in evidence the letters dated October 28th, 1902, and October 30, 1902.

46 Judge Krum: I object to the letters, first, because they are not competent, even as filed in the Post Office Department, as creating a matter or thing in which the United States was interested directly or indirectly; secondly, that the letters are immaterial, because the only fact open to consideration upon the theory of the Government is the filing of them in the Department. What the letters themselves were or are is not material to any issue in this case.

The Court: Are these the letters which are the foundation, as you claim, Mr. District Attorney, of the investigation that was afterwards conducted by the Postal Department?
Col. Dyer: They are.
The Court: You will show they were afterwards filed?
Mr. Dyer: I will show as I go along that they were received by the Post Master General, and afterwards referred to the inspector in charge, who afterwards referred them to Chief Inspector Dice of this city. I cannot prove but one thing at a time.

Objection overruled. To which ruling of the Court, defendant, by counsel, then and there duly excepted.

The Court: Of course it will be understood now that the truth of the statements in the letters may be entirely immaterial. The only question is whether the letters present something that would be matter of investigation, and therefore it may become necessary and proper to read the letters. But the truthfulness of the letters, as to whether they state the truth or not, is immaterial. The only material thing is whether they present the subject for investigation.

Counsel for the Government here read the letters in evidence, the same being in words and figures as follows, to-wit:

47 (Stamped) P. O. Department.
Div. of P. O. I. & M. D.
Distributing Desk
Nov 3 1902
Received
Washington, D. C.

856 Third St., Albany, N. Y.

Postmaster General,
Washington, D. C.

Dear Sir: I wish to draw your attention to a matter which seems to me to come under your jourisdiction.

On Oct. 16th I mailed to the Rialto Grain & Security Co., Rialto Bld., Mo., a New York draft on the Albany Co., Bank of $30. thirty dollars for investment. They have failed to notify me of receipt of draft and I have written them letters which they refuse to answer. Will you kindly trace the same and oblige

BELLA EVANS.

Oct. 28th, 1902. 856 Third St., Albany, N. Y.

(Stamped) P. O. Department
Div. of P. O. I. & M. D.
Distributing Desk
Nov 1 1902
Received
Washington, D. C.

Albany, N. Y., 856 Third St.

48 Postmaster General,
Washington, D. C.

Respected Sir: Through our local P. M. I have made formal complaint of the Rialto Grain & Security Co., of St. Louis, Mo. One of your inspectors was in the Albany office at the time and through an employee of the office advised me to write you stating the case. The parties named have swindled me in the sum of $50 sent them. They made false quotations and utterly ignored my instructions and my demands for the return of my money. They utterly refused to answer my letters. They sent a slip of paper inclosed in one of their letters stating that if I returned same with remittance they would guarantee me six hundred per cent within 10 days on Dec. corn. I sent $50 only to be swindled. I have a son in the 8th Cav. Troop L. U. S. A.

whom I wanted to visit and hoped thus to gain the means to do so. Will you kindly have the P. M. at St. Louis investigate. I will go before a magistrate and make oath to my statements if necessary.

Yours very Respct.,

MRS. K. C. HONT.

Arthur M. Allen, a witness of lawful age, produced, sworn and examined on the part of the Government, testified as follows:

Direct Examination

By Mr. D. P. Dyer.

Q. State your name? A. Arthur M. Allen.

Q. How old a man are you? A. Sixty-two.

Q. Where do you live? A. Staten Island, New Brighton.

Q. State of New York? A. State of New York.

Q. I show you a letter, date New Brighton, Staten Island, and ask you to look at it and see whether you wrote that
49 letter to the Post Master General, and mailed it. A. (After examining letter): Yes sir.

Q. I will get you to state whether this paper and this booklet (indicating) or whatever it is, was enclosed in your letter to the Post Master General? A. Yes sir.

Q. I don't see any date upon this letter except the date of its receipt in the Post Office Department, which is December 30, 1902. Have you any independent recollection of the date of that letter? A. No, sir.

Q. You don't know the date of the letter? A. It was about 1902, at the end.

Q. But you have no independent recollection of the exact date? A. No sir.

Q. This letter, with these papers attached, as I understand you, was sent by you to the Post Master General at Washington? A. Yes, sir.

Col. Dyer: I offer this letter, with the attachment, in evidence.

Judge Krum: I object to this letter, the letter of the Rialto Grain and Securities Company which accompanies it, and this booklet, which seems to be torn in half, on the same ground as stated in the objection to the introduction of other letters.

Also on the ground that there is no specification in any count of the indictment that any such thing as this constituted any part of the foundation of an inquiry set on foot, as your Honor has held that this indictment alleges, by the Post Master General; and also, that this letter, as appears from its contents, is not a matter of complaint at all, but is simply a vehicle for

transmitting the letter of the Rialto Grain and Securities Company to the Post Office department. Your Honor will
50 see from the thing itself.

The Court: You claim, Mr. District Attorney, that this also represented a matter which was before the department and the subject matter of inquiry, as charged by the indictment?

Col. Dyer: Yes, and became a part of the same papers under the same number.

Objection overruled: to which ruling of the Court the defendant, by his counsel, then and there duly excepted.

The Court: You will show that it afterward became a part of the same case?

Col. Dyer: I will, and that it was given the same number as the others.

Counsel for the United States here read the letters referred to, which were in words and figures as follows, to-wit:

P. O. Department
Div. of P. O. I. & M. D.
Distributing Desk
Dec. 30, 1902.
Received
Washington, D. C.

New Brighton, Staten Island.

Plstmaster General:

Dear Sir: When the enclosed circular and book came to my address, my first impulse was to destroy them, but it occurred to me that they might be liable for using the mails for evil purposes, so they are herewith enclosed.

ARTHUR M. ALLEN.

(Stamped on the back):

51

P. O. Department
Received
Dec. 29, 1902.
Office of the Chief Clerk.

Hugh C. Dennis, President.	W. D. Mahaney, Secretary.	John H. Hundley, Gen'l. Manager.
Pres't Dennis Underwriting Agency.	George F. Munsa, Treasurer.	Taylor & Harlan, Counsel.
Wm. M. Leftwich, Vice-President.	F. B. Weeks, Cashier.	

Rialto Grain and Securities Company.
Incorporated
Grain, Cotton, Bonds and Provisions.

Special References:
The Tilden Company, St. Louis.
Kastor & Sons Company, St. Louis.
Skinner & Kennedy Company, St. Louis.
The Barr & Widen Mercantile Agency Company, St. Louis.
Bankers:
Fourth National Bank.
Commercial Trust Company.
Germania Trust Co.

Telephones:
Kinlock, A 1747
Bell, Main 3074

Orders executed on Margins
Private Wires.

Suites 202, 208, and 214 to 224 Rialto Building.

St. Louis, Mo., October 22, 1902.

A. M. Allen,
New York, N. Y.

Dear Sir:—

We take pleasure in providing you with the booklet enclosed. One hour of your time given to it, if you will follow the suggestions contained therein and make an investment in December Corn, may prove the old adage that "time is money" to your entire satisfaction.

We have made enormous profits for our customers within the past six months in corn deals. We expect to meet with even greater success in December corn. We would like you to be one of our early investors. Buy now, while the price is extremely low, and your profits will be all the greater.

Why Buy December Corn

Because: December corn today is selling around 52 cents; while, under existing conditions, with Armour absolutely in control, we believe it will sell at 75 cents or higher before the first of the year.

Because: December corn today is from 6 to 7 cents under cash corn, while at the same time last year it was selling at a premium over October corn of 2-1/2 cents.

52 Because: December corn means Old corn, and the stocks of Old corn in this country have not in twenty years been as low as at the present time. There is not even enough old corn left to supply the manufacturing industries in this country alone for sixty days. Do not overlook the astonishing fact that there is now being manufactured over sixty food products wholly from corn.

Because: The extreme lateness of the season all through the corn belt, together with damage to the growing crop from frost and continued rains absolutely prevents any new crop of corn grading before the end of December next. With con-

tinuance of bad weather these damage reports are daily growing worse, and from many sections are really alarming as to the extent of damage already irreparably done.

There are many other reasons why the purchase of corn for December delivery at this time should be put before you, but the above and those set forth in our booklet are, we believe, sufficient to prove our contention that a purchase at this time of corn for December delivery will return you enormous profits. Wire your order to buy December corn, and let your remittance follow by mail.

Very respectfully yours,
RIALTO GRAIN AND SECURITIES COMPANY,
Hugh C. Dennis,
President.

Counsel for the United States also offered in evidence the book enclosed with above letters, which was admitted in evidence and marked and is in words and figures as follows, to-wit:

How a Modest Fortune May Be Made From a Small Investment.

"Golden Gain from Golden Grain."

Introductory.

To those who are properly ambitious and desire to secure a fair proportion of the country's wealth by legitimate business methods, who will reason and think for themselves, this
53 little booklet is respectfully dedicated.

That speculation is legitimate needs no argument, as there is no line of business known which is not speculative, from the great Life Insurance Companies who speculate on the length of your life, to the little Grocer who buys a quantity of sugar or coffee, feeling that he can sell same at a profit. The world's great Markets, the Chicago Board of Trade, and the New York Stock and Cotton Exchanges have presented opportunities within the past year from which, on small beginnings, great fortunes have been made by judicious investment at the right time.

A careful persual of the following pages will convince you, we believe, that our views are logical and conservative, and that an envestment made along the lines we suggest, will produce for your tremendous profits within the next sixty days.

Respectfully,
RIALTO GRAIN & SECURITIES CO.
214 to 224 Rialto Building,
St. Louis, Mo.

RIALTO GRAIN & SECURITIES COMPANY

Incorporated

Grain, Cotton, Bonds and
Provisions
Orders Executed on Margins.
Private Wires.

Suites 202, 208 and 214 to 224 Rialto Building.
St. Louis.

54 Hygh C. Dennis, President,
President Dennis Underwriting Agency.
Wm. M. Leftwich, Vice-President,
W. D. Mahaney, Secretary,
George F. Munsa, Treasurer.

Bankers:

Fourth National Bank.
Commonwealth Trust Co.
Germania Trust Co.

Special References:

Kastor & Sons Company, St. Louis.
Skinner & Kennedy Company, St. Louis.
Any information you desire as to our financial standing will be furnished you by the
Barr & Widen Mercantile Agency Company,
whose address is
514-516 Commercial Bldg., St. Louis.

They have made a thorough investigation of our Company, and can give you an intelligent report, free of charge.

$5,850 In Two Months.

Can you make $5,850 in two months? If so, stop right here, for this torse tale is not meant for you. Otherwise—otherwise.

$5,850 is lot or a little money, it depends on how long and how hard you work for it. May be you are clever enough to save, say, $1.00 per day. If so, in sixteen years you will have $5,850.

Remember, it is not what you make but what you save out of what you make. Or may be you have a clean, comfortable business that nets you a solid, substantial sum, not in a two month but in a twelve month.

If so, you are worth about $97,000.

55 Unfortunately, some of us haven't the $97,000 profitably, or even unprofitably, invested, and others of us just don't want to wait sixteen long, saving, scraping, suffering years.

A Small Investment.

Let's invest $100 and see what happens, for you must invest to make money.

No one ever became even modestly rich simply working for someone else. You must use other people's hands—other people's brains.

Real estate would be a pretty good investment if you could get in on the ground floor on any active market, but $100 won't buy very many city lots or country plots, and $100 won't buy much of a stock for a store.

There is, however, a fruitful field where a reasonable amount of capital can be quickly turned over into positive profits if it is judiciously and intelligently invested.

We mean the purchase of any of the great staples in the commercial world whose values are constantly shifting, now increasing, now decreasing, depending upon the thousand and one governing conditions of each day, of each hour, of each minute.

Fortunes are made between dawn and dark by those who know and—act quickly. He who hesitates is lost.

Yes, it is speculation—but what business is not more or less speculation? Life insurance is a speculation on whether you die today, to-morrow or next year.

A clothier speculates in selling the fads and fancies of wearables. A new doctor takes chances—"patient" chances. The banker runs real risks on his loans. Every business enterprise contains an element of doubt—a business
56 chance.

Viewed in the light that nine out of every ten men who go into business fail, investments on the Chicago Board of Trade or the New York Stock and Produce Exchange are far from "wild" speculations.

Just Business Judgment.

Of course there are foolhardy speculations just as there are rash business ventures, but you take no unusual business chances if you use usual business judgment.

With $100 as a beginning, $5,000 or $50,000 profits can be made if you get in on the right thing—at the right time—with the right kind of brains behind it. There isn't any guess work or theory of supposition about this, just hard cold blooded facts—here they are:

"On June 15th, 1901, a client of the firm deposited with me, at my suggestion, one hundred dollars, to be invested in corn for September delivery. I purchased for his account 5,000 bushels at 43 1/2c per bushel, with a margin of 2c per bushel, and we sold his holdings at 47c, giving a profit of $175.00. This added to the principal gave $275.00. I purchased again at 47-1/2c per bushel, 10,000 on a 2c margin, investing $200.00,

leaving a balance on hand of $75.00. I resold at 50c, making a profit of $250.00, which added to the former amount made $525.00. On a decline from 50c to 49, I bought 25,000 bushels at the low figure, 49c, and resold at 54-3/4c, making a profit of $1,425.00. This made the capital then $1,950.00. The price of corn then broke back to 50c, and at that price I bought 50,000 bushels. This I sold at 57, which gave a profit of $3,500.00, which, added to the former capital, made the amount on hand $5,350.00. Realizing at that time that the drought was likely to be broken at any time and that the price
57 of corn would drop as soon as there were signs of rain I drew out of the market all of the above funds, with the exception of $500.00, with which I bought 1,000 bushels of corn at 56c. Corn continued to advance and I sold at 62c, making a total profit of $600.00. This added to the amount already on hand, gave $5,950.00, or a net profit of $5,850.00 in two months on an investment of $100.00."

CHARLES H. BROOKS.

Subscribed and sworn to before me this fifth day of December, 1901.

[Seal] GUILLEMINE E. TREADWAY,
My commission expires April 5, 1903. Notary Public.

"Under oath, I make the following statement, it being true to the best of my knowledge and belief. On the 23rd day of March I deposited $25.00, to be invested in corn and handled as the judgment of its officers might dictate. On that date there was bought for me 1,000 bushels of corn at 59c, protected with a margin of 2-1/2c a bushel, and afterwards sold on the 12th day of April at 61-1/2c, giving me a profit of $25.00, or a total credit of $50.00. On the same date they again bought for me 2,500 bushels of corn for July delivery at 61-3/8c, and again sold on April 14th at 62-7/8c, giving me a profit of 1-1/2c a bushel, or $37.50. On the same day they again bought for me 4,375 bushels of corn at 62-1/4c, protected with a margin of 2c a bushel, and on the 16th again sold at 63-1/4c, giving me a profit of $43.75, which added to my former credit gave me a total credit of $131.75. On the 16th they again bought for me 6,562 bushels at 63c, protected with a margin of 2c, a bushel, and sold on the 23rd at 66c, realizing a
58 profit of 3c a bushel, or a total of $196.86, which added to my former capital gave me a credit of $328.18, less $25.00 my original investment, leaving me a total net profit of $303.10 in twenty-eight days on an investment of $25.00."

Subscribed to this 13th day of April, 1902.

R. RAY BRYAN,
Deer, Mo.

Subscribed and sworn to before me this 23rd day of April, A. D. 1902. My term expires February 12th, 1903.

[Seal] JANE M. WHITELAW,
Notary Public.

You can't dodge these firm facts. The experience of these men is simply evidence of what we have done. And isn't it logical to conclude that what we have done for others we ought to be able to do for you, and do it in corn, too?

Why Corn?

We want to say in big black type, the very same thing can be done again in corn—done to-day.

For the next four months corn will offer more attractive speculative opportunities than any other commodity, bar none. We are so absolutely sure of this that we make these two prophecies.

First: Cash corn will not sell again for less than 40c per bushel, no matter how large the crop may be.

Second: Corn will sell for $1.00 by December 30.

Early last summer we became thoroughly convinced that an irresistible advance movement of corn was under way. We told the pulbic so. We [asservated] that prices would reach top figures before the new crop was harvested.

59 The correctness of our position has been unalterably demonstrated by the events of the past few weeks.

When the price was 35c we predicted a quick rise to 48c, that in June prices would be 70c, and in July, 1902, as high as 75c.

Were we right? If you know anything of the corn situation during the past eight months, you have already been convinced that we were.

Millions Made.

Millions in profits were taken at 90c, then the market eased off considerably in line with the policy of the forces behind the movement.

The uninitiated is liable to conclude that 1902 corn has passed into history and that there will be "nothing doing" during the remainder of this year.

This is an unmistakable error for at least two very good and sufficient reasons:

First: Present supply and demand.

Second: Pending manipulations.

Crop Conditions.

The average American corn crop aggregates over two billion bushels. This is more than 80 percent of all the corn produced in the entire world.

Until 1896 but 3 per cent of the United States corn crop was exported, and up until that time price range was from 20c to 25c per bushel—except as unusually short crops naturally elevated valuations.

In 1890 we exported thirty-one million bushels. Last year we exported two hundred and ten million bushels, an increase of 700 per cent in twelve years; yet, with all this magnifi-
60 cient gro-th, not more than 25 per cent of the corn crop is ever shipped in its natural state out of the location in which it is grown.

Corn Consumption.

It is universally conceded that America supplies the meats of the world. And it takes corn to fatten hogs and cattle, more of it every day. Ten years ago when man ate corn it was meal or hominy; to-day it is served up in dozens of different dainty, appetizing ways.

Corn is the basis of forty-seven food and one hundred and eight commercial products. The pure food movement which is sweeping the country from stem to stern offers numerous new and interesting ways of increasing the consumption of corn products.

Foreign Trade.

Abroad, much missionary work is done in the name of corn. The Continental peoples are overcoming their prejudices for the "cattle food", and are finding American maize a luxurious and indispensable article of daily diet.

In the Mississippi Valley an organization has been in active existence for promoting the use of corn as an article of food abroad. To-day, corn is king, not cotton.

Manufacturing Necessities.

The manufacture of glucose or "grape sugar" will illustrate the increased demand for corn. The glucose exported from this country in 1890 was worth $850.000; last year we sold to foreign nations an amount of this product worth $3,600,000. In the meantime our export of starch increased from $475,000 in 1890 to $2,640,000 last year.

61 From every highway and byway of the world comes a call for corn. Though prodigious is the annual output of our vast expanse of waiving, rolling fields, the insistent, persistent cry for still more corn is eating away the surplus margin at an alarming rate.

Alarming from an agricultural viewpoint, because the total area suitable for the profitable production of corn is almost totally utilized.

There can be no material enlargement of acreage, and of course the yield per acre depends entirely upon the season.

Thus, the crop is no greater than that of 1899; in fact, during the past twelve years the supply has been almost uniformly the same.

Stop a moment and weigh well what this means! Production is reaching the maximum, while consumption is just leaving the minimum.

In the last five years there has been an increased demand for corn of over four hundred million bushels, entirely apart from the demand for this cereal as an article of human food, and it is the human food feature that will hold public attention from now on.

Present Prospects.

With such future prospects let us turn to the immediate and present crop prospects.

Those who live in the grain belt and raise feed or corn and those who have investigated the corn markets and general grain situation, know that the drought of last summer which swept the heart of the corn district of the Central and Western States was the most blasting and devastating those sections ever experienced. Instead of just an average crop of over two billion bushels, the output was only one billion two hundred
62 million bushels; a shortage of a full billion bushels.

When two billion bushels are insufficient to supply the growing demand, what must be the actual condition with such a startling shortage?

Very little corn is carried over from one year to the next. Even in 1890 the crop was under average and a very small amount held until 1891.

The last Government report estimated the total amount of corn left in the hands of the farmers at five million bushels. Upon this utterly inadequate surplus must fall all the home and foreign demands until the new crop is harvested and marketed, which Will Not Be Until the First of December at the very earliest.

The manufacturing interests such as starch, glucose and food products need twice that amount and more.

Even the man who seldom thinks more than four times a minute can't fail to realize that those who must have corn will be compelled to pay for it just as all of us will be compelled to pay for hard coal this winter because of curtailment of production. And those who have corn to sell will simply reap a harvest.

Corn is bound to boom. It will reach higher prices than it ever has within the last twenty years, and during these two decades the $1.00 mark has been reached more than once or twice.

In 1892, with a crop amounting to one billion six hundred million bushels, or four hundred million bushels more than last years crop, corn reached $1.48 per bushel.

If now is not the time to buy corn when is it the time?

Manipulation Affects Prices.

63 These natural causes, sufficient in themselves to offer speculative opportunities of a life time, are simply the foundations for one of the biggest deals the produce world has ever known. Shrewd, successful operators keenly realize the true inwardness of the situation and have manipulated corn, taking profits at will. They are now prepared to put prices up at the opportune time.

In 1892 George H. Phillips, previously unknown to fortune and to fame, cornered corn with a capital of less than one hundred thousand dollars, and earned the sobriquet of "King Corn".

The members of the syndicate that to-day hold the corn situation in the hollow of their hands are the most successful speculators of Chicago, New York and St. Louis. Where Phillips had thousands they have millions.

The Recent "Bull".

During the first months of this year the syndicate sold large quantities for May delivery, and by [thoring] their holdings on the market at a propitious period succeeded in keeping prices far below figures justified by the real conditions.

This depressed May corn and had the ensuing effect on July and September deliveries.

Gates and his associates openly sold corn for May delivery but secretly purchased immense quantities for future deliveries. It has been reported from sources always credited as reliable, that the syndicate alone now holds more than fifteen million bushels for December delivery. In addition, these clever speculators have most of the cash corn of the country, which they secured on their July contracts. The result is, they have the market by the throat and when their plans are ripe, they can and simply will dictate their own prices.

64 The Natural "Bull" Season.

The syndicate is particularly fortunate in the period of their operation, for September, October and November and the natural "Bull" months of the year. Visible supplies and total supplies are always less at this period, consequently prices are more easily manipulated.

We have studied the situation from every point of view and are thoroughly convinced that in September, October and November, 1902, corn will make a new record.

It is an indisputable fact that there is far less corn and much more demand than at any corresponding period in the past twenty years.

Unless our calculations are all to the bad, there will be less than three million bushels of contract corn in December. Already ten times that amount has been sold for December delivery. That alone, without a single manipulation, would send prices skyward.

Don't Sell Now.

If you have corn, don't sell a single ear or a single bushel. Hold it until the last of October at the earliest. If you have a crib but not the corn, buy at once, do it to-day—don't delay. The autumn advances will come—and quickly.

Remember, contract corn will sell for $1.00 by December 31st. The new crop will have absolutely no effect or influence on the present situation, because the advance will be made before the leavening effect of the new yield can possibly be felt.

You can just cross the new crop right off the map as far as it concerns the present unusual opportunity of securing substantial returns from judicious and carefully managed speculations.

65 If you have any doubts about these facts, send us the doubts—we will remove them. Otherwise, send us your buying instructions at once.

Cash Future Corn.

Cash corn is now about 58c per bushel in Chicago. If you buy the grain outright, 5,000 bushels will cost you $2,400. $100 only will buy 170 bushels, and if you sell at 60c, you net the munificent profit of $3.40.

If you could do that every day in the year, which of course you can't do, it would only take you four and one-half years to get $5,850.

Just about as easy as saving it. Or suppose you bought 5,000 bushels outright and held it as we advise for December delivery, you would have the expense of three months storage, insurance and handling. There would also be the loss incidental to shipping and shrinkage. Add this to the interest on $2,400, the actual cost of the corn has been increased several cents per bushel.

It is unnecessary to purchase the actual corn when you can make a contract to buy a certain amount at a given time and at a specified price. This is thoroughly legitimate and a daily occurrence in regular business channels.

Retailers, manufacturers and jobbers purchase stocks and materials for future delivery at an agreed upon price.

If valuations increase, as they frequently do, the purchaser makes a profit without touching a single bale of goods, then he sells the stock and has delivery made to some one else, thereby making profits as a result of his foresight and business sagacity, and all the time he never had a single dollar actually tied up in merchandise.

Of course his credit and his commercial standing was
66 a protection to the parties agreeing to deliver. You can buy corn in exactly the same way.

Now, if it is perfectly legitimate to make such a deal in pig iron or flannels, why isn't it just as legitimate to make a similar speculation in corn? and if it is not, won't some good and kind person tell us why?

Suppose you build a house. The contractor undertakes delivery at a certain date for a certain sum. Perhaps, when the house is partially completed you sell it at quite an advance on the contract price. You turn your contract over to the third party and take your profits before the construction is completed—more speculation—no, that is just simply business.

When you buy corn futures you go through exactly the same motions as the merchant or the man who builds and sells a house. You contract for grain at a certain price. Valuations go up, so you sell your contract through the broker making the original trade. You make a profit.

While you owned the contract you protected it with a portion of the purchase price. This deposit is called a "Margin" and usually runs from 1c to 5c per bushel. 5,000 bushels then at a 2c margin requires a deposit of $100. That is your working capital, and unless the price should drop 2c per bushel no more would be necessary to carry on the negotiation.

When the proper time arrived, one week or three months as the case may be, you sell your contract just as you would sell the actual corn from the cribs. Remember there is no storage, insurance or handling charges. All is clean profit.

The only expense is our small commission. One-eighth of
one per cent per bushel for handling the deal.

67 Our Special Corn Proposition.

If this does not strike you as being just about the very best plan for making money out of December corn, won't you tell us so? Won't you tell us just where it seems weak to you? If there is any better or more satisfactory way of working for and with you, we want to know it—and do it.

How Much Corn Will You Buy?

$25.00 will buy 1,250 bushels of corn.
$50.00 will buy 2,500 bushels of corn.
$100.00 will buy 5,000 bushels of corn.

$200.00 will buy 10,000 bushels of corn.
$500.00 will buy 25,000 bushels of corn.
$1,000.00 will buy 50,000 bushels of corn.

Now, suppose you buy 5,000 bushels of December corn at 40c and protect the contract with a margin of 2c a bushel. It would be necessary for you to advance $100. Suppose we sell this corn for you at 42c, your profit will be $100 on the transaction. Later, on a reaction, we again enter the market and purchase 10,000 bushels of corn, investing your total credit of $200. This corn, let us say, we sell at 41 1/2c. You would make a profit of $200 on the trade, giving you a total credit of $400. A little later we again buy in for you 20,000 bushels of corn at 46 1/4c and sell this on the advance for 48 1/4c, which would give you a profit of $400, and a total credit of $800. We again make a purchase at 47c, of 40,000 bushels, protecting the same with $800. We dispose of this corn at 49c, making a profit of $800 and giving a total credit of $1,600. Finally we purchase at 50c, 80,000 bushels of corn and sell the same for 52c, which would give a profit of $1,600 and a total credit of $3,200, less commission.

One Hundred Dollars Will Do It.

The peculiar crop and market conditions we have just explained make it possible.

68 If you have $100 uninvested, or not as satisfactorily invested as it ought to be—and you know it's pretty difficult to invest from $25 to $500 profitably—you can do much worse than send it to us for December corn.

Think this over carefully and be sure you thoroughly understand just what our proposition is.

Government Bonds Versus December Corn.

If we had the choice between Government bonds and December corn, we would choose December corn without a suspicion of hesitancy. Government bonds are sure and safe—but slow.

December corn will earn more profits in three months than 4 per cent Government bonds can in ten years.

Figure it out for yourself and then you will believe it.

Rialto Grain and Securities Co.

Naturally you ask why should the Rialto Grain & Securities Co. be specially adapted for serving your investment interests better than any one else, right at this particular period.

Incorporated in this little brochure are views taken in our general offices, 202, 204, 208, 214, 216, 218, 220, 222 and 224 Rialto Building, St. Louis, Missouri.

From the President's private office to the most obscure corner of the mailing department, our equipment and organization is as nearly perfect as intelligent, watchful and progressive management can attain.

We have the experience of years and know the ins and outs of the brokerage business from corn to corn cake. We don't claim to know it all or to be infallible, but we do know
69 just a little bit more than the average trader, and it's the fraction of a second that wins a horse race.

We don't know how to run a store or stop a locomotive, but we do know how to execute orders on margins for the financial benefit of our clients.

Some of us have spent a lifetime in the corn pit. That is one reason why corn is our specialty. There are others just as good. In fact, every man on our staff is a specialist. One knows how to do this well, while another succeeds better in another line.

Our organization is such that every man does the one thing that he is best adapted to do. We don't dissipate our energies or abilities—we don't make mistakes—well, not the same ones twice.

You not only get the actual buying and selling services of this institution, but you have the added advantages that are coupled with our knowledge and long experience.

That our methods are absolutely right is evidenced by the belief that we have more customers on our books than any other brokerage firm in St. Louis.

Our customers know that our exclusive time and efforts are devoted to watching and furthering their interests. That our agents in every section of the country are alert and active and keep us informed daily of the various local and crop conditions. That our representatives in the markets of the world have their fingers on the pulse of trade.

We know what we can do. We want you to know it.

We want the opportunity of proving that we can and do get results—the only safe criterion of successful investments.

70 Smallest Investment.

The smallest investment you can make is $25.00. We will buy corn for you on a margin of less than 2c. in fact we will buy for you on a margin as small as 1c per bushel, but we would advise all of our customers to protect their holdings by a margin of not less than 2c per bushel. We believe that a larger margin is not needed on corn at this time.

Our greatest successes have been attained by buying on an advancing market, selling just before the market declined and investing both the principal and the profits after the reaction.

Sales Made Immediately.

All your money, principal and earnings are subject to instantaneous withdrawal—any day—any hour.

Write or telegraph and we will close your account and send the money due you within an hour, by telegraph, if you desire, or by draft in first mail.

Unlike ordinary investments, you have a commodity that you can realize on immediately.

Don't hesitate to investigate our proposition fully, for kindly understand that you will not obligate yourself in any way by the desire to know just exactly what we can do for you.

RIALTO GRAIN & SECURITIES CO.,
(Incorporated)
214 to 224 Rialto Building,
St. Louis, Mo.

The Court: You may consider the book offered and refer to it if you wish.

71 Sarah A. Warner, a witness of lawful age, produced, sworn and examined on the part of the United States, testified as follows:

Direct Examination

By Col. D. P. Dyer.

Q. State to the jury your name in full? A. Sarah A. Warner.

Q. Where do you live? A. Pittsfield, Mass.

Q. Were you living there in 1902? A. I was born there.

Q. I show you a letter, the exact date of which is a little dim by reason of the Post Office stamp on the front of it, but it appears to have been received at the Post Office Department by the Chief Inspector on January 17, 1903. Look at that letter and state if you wrote it to the Post Master General? A. (After examining the letter). I did.

Q. And did you mail it to the Post Master General? A. I think I probably mailed the letter myself. I sometimes sent letters by the man.

Q. But you wrote the letter? A. I did.

Q. Did you at that time enclose with the letter this printed matter connected with it "giant oaks from acorns grow?" A. (After examining letter): Yes sir. And I think I put another one into it also.

Q. But you did put this one in? A. Yes sir.

Judge Krum: We object to that, to the introduction of these papers, on the same grounds mentioned before.

The Court: These were before the Department, and formed the subject matter for investigation?

Col. Dyer: Yes sir.

Judge Krum: I submit, if your Honor please, that the reading of these letters will simply operate to drag into this
72 case that which does not belong there at all.

The Court: It is not a question of good faith. The only question is whether it was pending before the Department in the form of inquiry, and perhaps I might say in answer to your objection that in the light of your argument before the Jury it is proper for you to contend that this is a trifling matter, that only two complainants were before the Department, or something to that effect.

Judge Krum: Only two that were brought to the attention of the defendant at all.

The Court: Just enough to show that something was submitted to the Department, enough to put them upon inquiry.

Mr. Lehmann: We object because it is tending to create an issue which should not be made. The fact that the letter was received is the only thing that is competent.

The Court: If it was sent to the Department, it becomes necessary to show what it was. It might be inoffensive matter, something not involving or suggesting an inquiry. But it is the basis of a proceeding, again stating that it is not an issue in this case as to whether the Rialto Grain and Securities Company was in good faith carrying on business. The only question is whether a question was pending before the Department. It is not necessary to read them any more than to call attention to them.

Judge Krum: We make the same objection as before.

Objection overruled. To which ruling by the Court defendant, by his counsel, then and there duly accepted.

Col. Dyer: I will read the letter and offer the booklet.

The Court: The booklet was also filed before the Department?

73 Col. Dyer: Yes sir.

Judge Krum: She had evidently read Judge Grosscup's charge in the McDonald case.

The letter of S. A. Warner was admitted in evidence and is in words and figures as follows, to-wit:

P. O. Department
Div. of P. O. I. & M. D.
Distributing Desk
Jan. 17, 1903

Received
Washington, D. C.
Chief Post Office
Jan 17 1903
Inspector

Post Master General
Washington, D. C.

Dear Sir: I take the liberty of calling your attention to the enclosed circulars which are being sent broadcast through the country by the mails. The business is not one whit more respectable than a bucket shop and is more injurious than the lottery. I have not been taken in. But as a farmer one of the most unfortunate class of American citizens I wish to protest against the whole gamble in grains and food stuffs which injures the whole country, us poor farmers first and benefits none. Further, I am sure the post office department does not wish or intend to lend its aid to any such gambling schemes whose promoters should receive the same justice allotted to card sharpers and green goods men who are Christian gentleman beside them.

Respectfully,

S. A. WARNER,
Pittsfield, Mass.

Box 1003

74 (On the back) For the Post Master General personally.
P. O. Department
Received
Jan 16 1903.
Office of the Chief Clerk.

The booklet offered in evidence is as follows:

* * * * * * * * *

(Here follows pamphlet entitled "Giant Oaks from Tiny Acorns Grow," which is omitted pursuant to the stipulation of counsel set out at page 1 of this record.)

Adjourned until 10 o'clock A. M. March 23rd, 1904.

March 23, 1904, 10 o'clock A. M.

Court reconvened, pursuant to foregoing adjournment.

Frank Russell Fravel, a witness of lawful age, produced, sworn and examined on the part of the United States, testified as follows:

Direct Examination

By Col. D. P. Dyer:

Q. State your name in full, if you please, sir? A. Frank Russel Fravel.

Q. Where do you reside? A. Washington, D. C.

75 Q. What official position, if any, do you hold at Washington? A. I am clerk in the Department of Agriculture.

Q. How long have you been there? A. About four years.

Q. I show you a letter, dated Department of Agriculture, Washington, D. C., November, 3, 1902, and ask you to look at that letter and see whether it is not signed by you, and whether it was written or dictated by you? A. It is written by me and signed by me.

Q. Written and signed by you? A. Yes sir.

Q. I will get you to state whether the papers attached to this letter were received by you at Washington, and whether they were closed in a letter addressed by you to the Post Master General; There are two letters there, one a circular addressed to you and one addressed to Mr. Wasden. A. (After examining papers) Yes sir, these are the same, or very like the ones I sent.

Q. Who is Mr. Wasden? A. He is a clerk in the same room.

Q. Clerk in the same room with you? A. Yes sir.

Q. And did you obtain the letter addressed to Benjamin C. Wasden, Department of Agriculture, Washington, D. C., from him? A. I did, yes sir.

Q. And this letter was mailed by you to the Post Master General, or sent by messenger? It was mailed.

Q. Sent by mail? A. Yes sir.

Q. Was it sent by you about the date it was written, or on that date, November 3rd? A. I think it was sent on that day.

The Court: Q. What year?

Col. Dyer: November 3, 1902.

(No cross-examination)

76 Col. Dyer: I offer in evidence the letters that were sent to the Post Master General.

Judge Krum: We make the same objection in regard to these that we did with reference to the other letters.

The Court: They are admitted simply because they bear upon the question that an inquiry was pending, and the nature of the inquiry, and for no other purpose.

To which ruling of the Court the defendant, by his counsel, then and there duly excepted.

Col. Dyer: I will read this letter, and then, if your Honor please, I would like to read or have read also the letters that were enclosed in this letter to the Post Master General that the witness identifies as having written.

Counsel for the Government here read the letter of F. R. Fravel, dated Nov. 3, 1902, which is in words and figures as follows, to-wit:

P. O. Department
Div. of P. O. I & M. D.
Distributing Desk
Nov. 4, 1902
Received
Washington, D. C.

Department of Agriculture
Washington, D. C.

November 3, 1902.

Postmaster General,
Postoffice Department,
Washington, D. C.

Dear Sir: I desire to call attention the enclosed circulars, mailed at St. Louis, Mo., in which the date of mailing
77 is blank. This is the case in all of these circulars that I have seen and it looks as though it is a case of fraud, as it may easily be said, in case of investment, that the order was not mailed in time. Is it presumed that it is the intention of the Postoffice Department to have the date stamped on these the same as on other mail matter.

Very respectfully,

F. R. FRAVEL.

(Stamped on the back)
P. O. Department
Received
Nov. 4, 1902
Office of the Chief Clerk.

Col. Dyer: I now read the letter accompanying the above.

Judge Krum: We submit, your Honor, that it is immaterial what this letter is. The only question is whether there was any action taken on it by the Post Office Department.

Col. Dyer: I submit that it is part and parcel of the inquiry, so I may have before the jury what the Post Master General had. It will be for them to determine in a measure whether there was a matter pending before the Department at the time, and the character of the complaints ought to be shown to the jury so that they may understand what the letter was written about.

The Court. The rule is the same as before. It is admitted to show that there was a matter pending before the Department, and the nature of the matter. Both of them are important under the indictment in this case. What was the nature of the matter is important.

Counsel for the Government here read the letters last referred to, the same being in words and figures as follows,
78 towit:

Hugh C. Dennis,
President,
Pres't Dennis Underwriting Agency
Wm. M. Leftwitch,
Vice-President.

Wm. D. Mahaney, Secretary.
George F. Munsa,
Treasurer,
Taylor & Hatlan,
Counsel.

Rialto Grain and Securities Company
(Incorporated)
Grain, Cotton, Bonds and Provisions
Orders executed on Margins.
Private Wires.
Suites 202, 208 and 214 to 224 Rialto Building.

Special References:
Kaston & Sons, Company,
St. Louis,
Skinner & Kennedy Company,
St. Louis,
The Barr & Widen Mercantile Agency Company
St. Louis,

Bankers:
Fourth National Bank.
Commonwealth Trust Co.
Germania Trust Co.
Telephones:
Kinlock A 1747
Bell, Main 3074.

St. Louis, Mo. October 29, 1902.

F. R. Fravel,
Washington, D. C.

Dear Sir: A short time since we mailed you our booklet advising the purchase of December corn. At the time we mailed this booklet December corn was quoted on the Chicago market at 43 cents. Today the market price is 51 cents. An investment made then would show eight hundred per cent profit to date. Can you find any other safe investment in America which will return any such profit? We think not.

If you have any spare money, from $25 to 500, invest it in the purchase of corn for December delivery, and if your investment is properly managed your profits will be enormous.

For the past year we have devoted our time, our resources and our money exclusively to obtaining every bit of information possible regarding the corn situation. Last winter we, in the face of a falling market, predicted 75-cent corn for July.

July corn sold as high as 90 cents, and such of our customers as took our advice made enormous profits.

Before the expiration of the July option our every energy was put forth to find out the true situation of corn for September and December deliveries, and, on information so obtained, we predicted 65 cent corn for September. Twice since then has September corn sold above 65 cents. We now believe that December corn will sell at or above the price July corn sold for,—our reasons being that there is little or no old corn left in the country, not enough for manufacturing purposes alone for more than sixty days; and James Patten with his following and the Armour crowd of Chicago, with their friends in that city, New York and St. Louis, have since July bought over thirty millions of bushels of corn to be delivered to them in December. Again to repeat, there is no old corn in the country to speak of, and these gentlemen who now hold corn bought to be delivered to them in December may put the price to any figure they wish. This is why we tell you
79 to buy December corn. Buy all you can carry, and buy it at once.

We solicit your patronage and suggest that you wire your order and let your remittance follow by mail.

Very respectfully yours,
RIALTO GRAIN AND SECURITIES COMPANY,
Hugh C. Dennis,
President.

P. S.—The enclosed leaflet may interest you.

Col. Dyer: The letter addressed to Wasden, Washington, D. C., and enclosed in this letter (indicating) is a different letter from the one just read, and the same is one of the letters introduced in evidence yesterday, and I will consider it is in evidence. It may be alluded to hereafter, without taking up your time by reading the letter of Wasden now. Also the booklet [refferred] to, inclosed in these communications and sent to the Post Master General, so that the whole matter may be embraced in this letter.

Blain W. Taylor, a witness of lawful age, produced, sworn and examined on the part of the United States, testified as follows:

Direct Examination

By Col. D. P. Dyer:

Q. What is your name? A. Blain W. Taylor.

Q. Where do you live, Mr. Taylor? A. In Washington, D. C.

Q. What official position, if any, do you hold in Washington? A. Chief Clerk of the Post Office Department.

Q. And how long have you been Chief Clerk of the Post Office Department? A. Since 1896, February, 1896.

Q. Will you state to the Jury whether matter addressed to the Post Master General is received by you, as Chief Clerk? A. Yes, sir, correspondence addressed to the Post Master General passes through the Chief Clerk's office, and is there
80 answered, either the answers prepared or referred to the proper bureau for attention.

was

Q. Now, there a stamp used in your office indicating the date of the receipt of letters in your office, upon which is put the stamp? A. Yes, sir.

[A. Yes sir.]

Q. I show you a letter addressed to the Post Master General, signed "Bella Evans", and ask you to look at that letter and state whether the stamp that is upon the face of that letter is the stamp of your office as Chief Clerk of the Post Office Department? A. (Examining letter) The stamp on the face is not my stamp, no sir. The stamp of the Chief Clerk of the Post Office Department appears on the back of the letter.

Q. When was that letter received at the Post Office Department? A. November 1, 1902.

Q. Does that bear the receipt stamp of the Post Office Department? A. Yes sir.

Q. Look at the next letter there of K. C. Hout, and state when that letter was received at the Post Office Department, if you know? A. That letter was received at the Post Office Department October 31, 1902.

Q. After the receipt of those letters, what was done with the letters thus addressed? A. Those letters were transmitted to the division of Post Office Inspectors and Mail Depredations for attention.

Q. Who is at the head of that? A. William E. Cochran is Chief Post Office Inspector and head of that division.

Q. I show you a letter signed "S. A. Warner", of Pittsfield, Mass., with certain papers attached, and ask you to look at that letter and state to the Jury when that letter was received
81 at the Post Office Department? A. That letter was received at the Post Office Department January 16th, 1903.

Q. And what course did that letter take after receipt at the Post Office Department? A. That letter was referred to the Chief Post Office Inspector.

Q. Did that bear the stamp of the Post Office Department? A. Yes sir.

Q. I show you a letter, dated New Brighton, Staten Island, signed "Arthur W. Allen", and ask you to look at that letter and state, if you can, when that letter was received at the Post

Office? A. (After examining letter): That letter was received at the Post Office Department December, 9, 1902.

Q. And what course did that take after its receipt by you as Chief Clerk? A. That was forwarded to the Chief Post Office Inspector for consideration and attention.

The Court: Q. For attention? A. For such action as he thought proper.

Mr. Dyer: Q. I show you a letter dated November 3, 1902, signed "F. R. Fravel," and ask you to look at that letter, with the accompanying papers, and see when they were received at the Post Office. A. (After examining letter): That letter was received at the Post Office Department November 4, 1902.

Q. And what course did that take? A. That was referred to the Chief of the Post Office Inspectors.

Q. Now, under the rules of your department and the mode of [transaction] business at the Post Office, or the ordinary way of carrying on business at the Post Office, to whom would those papers go after the receipt by you, as Chief Clerk?

Judge Krum: We submit, if the Court please, that is
82 to be determined by the rules, if there are any.

The Court: If the rules are not in evidence, he may state what was actually done with them.

A. I would not be competent, I could not state positively what was done after they were referred to the Chief Post Office Inspector.

Col. Dyer: Q. How did they come to be referred to the Post Office Inspector? A. Because it is matter—those complaints are matters under the Customs Laws Rules and Regulations of the office, and are properly referable to that office for such attention as, in the judgment of the Chief Post Office Inspector, it is proper to give them.

(No cross-examination.)

George M. Smith a witness of lawful age, produced, sworn and examined on the part of the United States, testified as follows:

Direct Examination

By Col. D. P. Dyer:

Q. State your name in full? A. George M. Smith.

Q. And your residence? A. Washington, D. C.

Q. How long have you resided there? A. Since 1877.

Q. What official position, if any, do you hold at Washington? A. [A.] I am clerk in charge of a section in the office of the Chief Post Office Inspector, under the Fourth Assistant Post Master General.

Q. What section is it that you have charge of. A. It is designated as "C", or "Miscellaneous" section, in which

83 are jacketed and referred to the field and proper record made and kept of cases wherein fraud is alleged, fraudulent use of the mails is alleged, and charges against Post Masters, letter carriers, etc.—any charge touching postal officials.

Q. And the misuse of the mails, I take it? A. Yes sir.

Q. When complaints are lodged with the Post Office Inspector in charge, or the Chief Post Office Inspector, more properly speaking, who jackets and sends out as you say to the field—that is, you mean by that, sends out to the local inspectors— A. To inspectors in charge. They are referred, as I think, to the fifteen or sixteen inspectors in charge throughout the country, and the cases, after being jacketed, are referred direct to them for distribution and action, and the inspectors work under them.

Q. I show you these letters that have been introduced here, of Bella Evans and K. C. Hout, and call you- attention to the jacket in which they are enclosed. State whether that jacket and the endorsements thereon were made under your direction? A. Yes sir, they were.

Q. Having received these letters, they are enclosed in that kind of a jacket? A. Yes, sir, in a jacket.

Q. And then, from that office, forwarded to the local inspector in charge at St. Louis, were they? A. Yes, sir.

Q. Now, you may explain whether, in your department a number is given to these different complaints? A. Yes sir, that is always done when the case is first—before that, search is made; upon receipt of the complaint at the Department after it has been received at our office, a careful search is made to see if we have a jacketed case against the person, company or corporation complained against. That is to avoid dup-

84 licate cases. That was done in that case.

Q. Then this number, case "No. 13778 C", was the number you placed upon this case? A. Yes sir.

Q. After having jacketed the case and given this complaint a number, what was the course pursued in reference to any subsequent complaints against the same company? A. At the same time that jacket was made, there was an exact duplicate, called a carbon duplicate, that is retained for our records, ruled and fixed for the record of any subsequent papers or complaints that might be received, and their disposal is to be noted, should be noted on the official carbon or duplicate carbon, and that case filed in a specially prepared book kept at the Department.

Q. I show you now what purports to be a carbon copy retained in the office and ask you if that is the official record of complaints against this Rialto Grain and Securities Company

retained in the Post Office? A. That is the original of that case against the Rialto Grain and Securities Company at St. Louis.

Q. On that carbon are the subsequent complaints endorsed as they come in? A. They are.

Q. Now, state whether or not the subsequent complaints after this case was first jacketed, when they came in were they given the same number given to that particular case, and included in the same files? A. If a departmental custom was followed and the clerk who placed them did his duty, he should have placed a slip directed to the inspector in charge at St. Louis, referring to the case under the above number, and that number should have been 13,778 C, as given here.

Q. I will ask you to look over that record you have of your office, and I will ask you to state—that will appear by
85 offering the papers—if subsequent complaints were entered; were subsequent complaints entered at Washington? A. Yes sir, quite a number.

Q. And that is the record kept in your office of this particular case? A. Yes sir.

Q. Will you explain to the jury, after the case is thus made up and sent out to the local inspectors for examination, when, under the rules or proceedings of the Department is that case closed?

Judge Krum: We submit, if the Court please, that will be determined by the regulations themselves.

The Court: If the regulations themselves do not speak of the matter at all, do not refer to the matter of closing a case, then of course the custom of the department is proper.

Col. Dyer: There is no direct provision made in the rules as to when a case should be closed. I asked him what the course of business is when a case is closed.

The Court: That is, the usual course of business in the department?

Col. Dyer: Yes sir.

The Court: He may answer that.

A. A case is finally closed in our office when the papers are referred to him and his report is returned to the office with a recommendation for final action. An inspector, usually when he is done with a case and worked it out to a finish, he will return it to the department with whatever recommendation seems proper to him. He returns it, of course, through the inspector in charge of his division, who also in turn either approves or disapproves the recommendation. The recommendation in a case of this character might be a recommendation for the issuance of a fraud order and that the case be closed. A
86 case is never closed until the inspector's report and all

papers referred to him are returned to the department with the jacket and his final report therein.

Q. I will get you to state whether or not from the records in your office these papers I have asked you about called "Complaints", whether these papers ever have been returned to the department, and whether there has been any report made to the department and an official report of this case made?

Mr. Krum: We object.

The Court: I think he can state whether a report has been made, but not what the report is.

Col. Dyer: Q. You may state whether an official report has been made, and the case closed or not.

Judge Krum: We submit that if the fact that a report has been made is competent, then the report itself is also competent.

Col. Krum: I asked him whether an official report of that case has been made

The Court: I think the question is competent. It may be that the case was closed before the receipt or payment of money by the accused. It is beyond me to know whether the case was pending at the time of the receipt of the money.

A. I can only answer up to the time I left the department. After I was subpoenaed to report here in this case—no final report had been received in my office up to that time.

Q. When was that? A. I left there Saturday evening.

The Court: Q. That was last Saturday evening? A. Yes sir.

Col. Dyer: Q. I will get you to state whether or not when these papers are received in your office, there is a stamp used in the Chief Inspector's office to indicate the date of the
87 receipt? A. Yes. And every piece of mail received there, every important piece of mail, every letter, should bear the stamp of receipt in our office.

Q. When this case was first made up and jacketed—I will get you to look at the letters of Bella Evans and Mrs. K. C. Hout and state when these letters were received in your office? A. (after examining letters) The letter of Evans was received November 3, I think the stamp is on it, it may be a three or an eight, the stamp of the office is there, but my eye-sight is poor and I cannot tell whether it is a "3" or an "8", but it looks like an "8". (after examining further) No sir, it is November 3. The other letter of Mrs. Hout was received November 1, 1902.

Q. Now, can you state when these two letters were referred to Post Office Inspector Dice in charge of the St. Louis office? A. On November 7, 1902, they were forwarded from the Post Office department on the evening of that day.

Q. I will ask you whether these printed instructions on the back of this check were sent out to the Post Office Inspector in charge? A. Yes sir, that is part of his instructions for the government of the inspector handling the case.

Col. Dyer: I offer the paper showing reference to the Post Office inspector.

The Witness: May I state that that record is an official record from the Department, and should not go out of the custody of the Post Office Department unless the Court so directs.

The Court: Q. Is that the original jacket? A. I beg pardon, the paper I first had in my hand, the original jacket, is an official record of the department.

Col. Dyer: I offer this jacket and all these papers, this
88 jacket being the original record sent out, I offer the original record of the Post Office department in reference to this matter, with the endorsements on this original record.

The Court: Is that the original one that was sent out to the inspector in charge at St. Louis? A. The one in the District Attorney's left hand is the one that belongs in the department, brought by me with permission of the department.

The Court: Q. That is the one you referred to as being kept in your office, being a duplicate of the one sent out to the inspector? A. Yes sir, with the additional complaints on it.

Col. Dyer: Q. This I hold in my left hand is the original record from your department? A. Yes sir.

Q. The one in my right hand, sent to Col. Dice, is a copy of that record in the department up to the time it was sent out? A. Yes sir, embracing only the first two names.

Q. The others were added to this after it was sent out here? A. Yes sir.

Q. But the first one was sent out and referred to Col. Dice with the same number as endorsed on this (indicating)? A. Yes sir, the same number.

Col. Dyer: I will offer these things, as showing the original record.

Judge Krum: There are only three or four entries there that are competent, because they are the only ones that apply to these papers that have been introduced thus far.

Col. Dyer: I do not ask to read any portion of this record only the complaints that had already been made that were covered by the time the Government alleges the defendant was employed as counsel.

89 The Court: Q. It is the record of this matter before the Department? A. Yes sir.

Q. A record of what was done and what occurred there? A. Yes sir.

The Court: You may read it.

Judge Krum: We object to it as not competent, showing no such situation as the indictment covers.

Objection overruled; to which ruling by the court defendant, by counsel, then and there duly excepted.

Counsel for the Government read in evidence the papers referred to, which are in words and figures as follows: to-wit:

90 Papers and Reports of
Inspector .....
Sent to .....
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P. L. R. R. of 1902.

Miscellaneous.

Case No. 13778 C.

Chief Post Office Inspector.

(class office.)

Office St. Louis 1
County
State Mo.
Subject
Alleged fraudulent scheme.
Complainant Bella Evans
Mrs. K. C. Hont
Address 856 3rd St.
Albany, N. Y.
Date Oct. 30-02
Vio. of Sec. 1617
By Rialto Grain & Security Co.
Address St. Louis, Mo.

Washington, D. C., Nov. 7-'02

Respectfully referred to Post Office Inspector in charge at St. Louis

for investigation and report.

W. E. COCHRAN,
Chief Inspector.

(Stamped on the back is the following) P. O. Department received Oct. 3, 1902. Office of the Chief Clerk.

Instructions to P. O. Inspectors.

1. Upon receipt of this case the inspector will enter upon its investigation, either personally or by letter, and as soon as possible will return it to the Department, with the result properly reported, together with all papers relating to it.
2. Inspectors will render their reports, in each case, in the form of a letter, and not indorse them upon the jacket.
3. Inspectors are not allowed to transfer cases sent to them for investigation without special instructions or permission from the Department.
4. Inspectors are expected to avail themselves of the opportunities afforded them, in visiting Post Offices in their respective districts, to impress upon Postmasters the importance of reporting promptly to the Chief Inspector every complaint of loss by mail of letters or parcels, whether registered or unregistered, made to them or coming to their knowledge.—Sections 668, 669 and 670. Regulations 1893 and Sections 278 & 279 & 505 and 1565.

91 Correspondence.

Complaint of F. R. Fravel, Washington, D. C. sent Inspector Dice Nov. 8/02.

Complaint of Arthur M. Allen, New Brighton N. Y. sent Inspr. Dice Jan'y 5/03.

Complaint of S. A. Warner, Pittsfield, Mass. sent Inspr. Dice, Jany 21/03.

Complaint of E. Oulette, Stafford Sprgs. Conn., sent Inspr. Dice, Jany. 28/03.

Complaint Hon. Jesse A. Frye, U. S. Atty. Washington, sent Inspr. Dice Mch. 10/03

Complaint of F. P. Andrews, Coden, Ala. sent Inspr. Dice Mch. 20/03.

Miscellaneous

Case No. 13778C

Chief Post Office
Inspector.
(class office)
1

Office St. Louis
County
State Mo.
Subject: Alleged fraudulent scheme.
Complainant Bella Evans
Mrs. K. C. Hont
Address 856 3rd St. Albany, N. Y.
Date Oct. 30'02
Vio of Sec. 1617
By Rialto Grain & Security Co.
Address St. Louis, Mo.
Washington D. C. Nov. 7'02
Respectfully referred to [Post]
Post Office Inspector in charge at
St. Louis
for investigation and report
W. E. COCHRAN
Chief Inspector.
Date returned.....
Date closed .....
Papers and report Inspector .....
Referred to .....

Reference.

S

92 Col. Dyer: Q. Explain that "1617", as compared with the Revised Statutes? A. Section 1617 of the Postal Laws and Regulations is based upon that section of the Revised Statutes that empowers action against persons for using the mails in furtherance of any fraudulent scheme against the public and others.

Q. That was my understanding, that is section 1617 in this book (indicating Postal Laws and Regulations), is the same as section 5480 of the Revised Statutes, as amended? A. Yes sir.

Col. Dyer: I will read the parts referring to violation of section 1617 by the Rialto Grain and Securities Company.

(Counsel reads)

Col. Dyer: Then follow complaints subsequent to that time, which I have not introduced and will not read.

Col. Dyer: Q. I will ask you to look at this letter of J. R. Fravel, dated November 3, 1903, with the papers attached to it, and state to the jury when they were received in the office of the Chief Inspector? A. They were received in the office of the Chief Inspector November 4, 1902.

Q. And what is the number given? A. 13778 C.

Q. Look at this letter of Allen's, and state when that letter was received at the inspectors office. (Handing paper to witness)? A. That letter was received December 30, 1902.

Q. And recorded? A. Recorded January, 5, 1903.

Q. And what is the number given to that? A. 13778 C.

Q. The same as the original case? A. The same as before, yes sir.

Q. And does that show when it was referred to Mr.
93 Dice, or does your record show? A. January 5, 1903 is the date of the reference to Mr. Dice.

Q. Look at the letter of S. A. Warner and state when that letter was received at the Chief Post Office Inspector's Office (hands letter to witness). A. This letter of S. A. Warner was received at the office of the Chief Post Office Inspector January 17, 1903.

Q. And what became of that? A. On January 21, 1903, it was referred to the inspector in charge at St. Louis, Mr. Dice, under the same number, 13,778 C.

Cross-Examination,

By Judge Krum:

Q. What is called the "Complaint of Bella Evans" and Mrs. K. C. Hout, was referred to the Post Office Inspector in charge at St. Louis, on the 3rd of November, 1902? A. Yes sir.

Q. As shown by this jacket, as you call it? A. I call that a retained carbon of the jacket.

Q. Now, as I understand you, no report had been made upon that complaint so referred, down to the time when you were subpoenaed and left Washington? A. No sir, I didn't say that, I said for final report.

Q. Was any report made? A. A report was made, what is called a special, or preliminary report was made in that case, I think, in August, or about the 1st of September. There is a memoranda under your right hand.

Q. That is in August, 1903? A. 1903.

Q. No report had been made down to the 1st of April, 1903? A. No sir, no report.

Q. No report of any kind, preliminary, or otherwise? A. None have come through the regular channels.

94 Q. —as far as you know? A. No sir.

Q. Accordingly, this so-called complaint of Bella Evans and Mrs. K. C. Hout, was, so far as any inquiry in regard to it concerns located here in St. Louis, from the time

it was referred in November, 1902, down to the 1st of April, 1903—that is, whatever action was to be taken with reference to that co-called complaint, was to be out here? A. Yes sir.

Q. Not before any person or any officer or any person connected with the Post Office Department in Washington, that is, with the office of the Post Office Department? A. I cannot say as to that. There might be communications between the Inspector in charge and the Chief Inspector, either telegraphic or by letter, touching that case that I might not know of. But I can speak of matters that would take the ordinary channel in cases of that character; that, so far as the records would show, would be during the interval to which you have referred in the St. Louis Division.

Q. It was not then before anybody but the inspector in charge here for St. Louis? A. Well, I could not—

Q. I mean, in the ordinary course of procedure? A. We would regard it as before the department under action.

Q. But whatever action was to be taken would be here by the Post Office Inspector in charge, wouldn't it? A. I cannot limit my answer to that.

Q. I do not mean to say there could not be inquiries passing from St. Louis to Washington, or Washington to St. Louis. A. The public would not know the disposal of that case, and the inquiries would be made at Washington concerning it.

Q. You are not answering my question. I want to know, as you have indicated already—whether the matter was
95 before any subordinate or official in the department at Washington for action down to the time when some kind of a report came from St. Louis, down to this reference? A. I would regard the matter before the department—

Q. I am not asking whether you regarded it before the department or outside of the department. I want to know from you what official in Washington had this matter in charge after it was referred to the Post Office inspector here in charge? A. The Chief Inspector, I would say.

Q. What had he to do about it? A. He has charge of all the inspectors.

[A.] But this had been referred now, out of his office into this local office in St. Louis, for action here. Now, after that reference, wasn't it here in St. Louis? A. The case was here?

Q. Yes? A. Yes sir.

Q. That was applicable to all of these complaints, was it not, that after the papers were referred to St. Louis, and until the report was made from St. Louis, they were pending here? A. Pending here, yes sir.

Q. And as I understand you, in the regular course of business, a report would be made from St. Louis before action was taken in Washington, wouldn't it? A. Yes sir, from the inspector.

Redirect Examination.

By Col. Dyer:

Q. To make the matter a little more specific, these inspectors, including Mr. Dice, the Post Office Inspector in charge, is, as you know from the rules and regulations of the department, under the direction and control of the inspector at Washington; do you understand that?

96 Objection on the part of the defendant, on the ground that the regulations speak for themselves.

The Court: The regulations so state, and it is not necessary for him to recite that they are subject to the control or under the directions of the inspector in chief at Washington.

Col. Dyer: Q. You have stated pretty fully, I think, the course taken by the department with reference to these latter complaints. That is, the department refers it here for the purpose of taking evidence and making inquiry into the matter; is that so? A. That is true, sir.

Q. And upon that evidence action is taken by the local inspector here and report is made to the inspector in charge? A. Yes sir.

Q. And upon that report and the examination submitted of evidence, or otherwise, that inspector acts; he can approve or disapprove of the report of the local inspector? A. Yes sir.

Recross Examination

By Judge Krum.

Q. Where does it go then? A. The report, in a case of this character, would quite likely go to the Assistant Attorney General for the Post Office Department.

Q. He is charged under the regulations, isn't he, with the preparation and hearing of such cases; isn't that the very language of the regulations? A. I am not sure as to that, but I think so. That is my understanding of it, that he is the law officer of the department.

Q. Now, isn't it a fact that Section 21 of the Regulations, charges the Assistant Attorney General for the Post Office Department, with the duty of hearing and preparing cases relating to the misuse of the mail in furtherance of schemes
97 to defraud the public? A. I think that is the fact.

Redirect Examination

By Col. Dyer.

Q. You mean by that that if the local inspector at St. Louis was to recommend in his report of this case to the inspector in charge at Washington that a fraud order be issued, then the matter would go [—] the Assistant Attorney General for the department for hearing, is that true? A. Yes sir.

Q. And he himself would determine as to whether or not a fraud order should issue? A. Yes sir, that is correct.

George A. Dice, a witness of lawful age, produced, sworn and examined on the part of the United States, testified as follows:

Direct Examination

By Col. D. P. Dyer.

Q. What is your name? A. George A. Dice.

Q. And your official position? A. Inspector in charge of the St. Louis Division.

The Court: Q. Of what? A. Comprising the states of Iowa, Missouri and Arkansas, with the exception of Kansas City, Missouri, which is excepted.

Col. Dyer: Q. Of the Post Office Department? A. Yes sir.

Q. How long have you been an inspector, Mr. Dice. A. I think about 23 years.

Q. In 1902 and 1903 where were your head-quarters? A. St. Louis?

Q. Were you Post Office Inspector in charge at St. 98 Louis at that time—during that time? A. I was.

Q. And various other inspectors of the Post Office department reported to you for duty, is that true? A. Yes sir.

Q. And at that time how many inspectors were there in this department reported to you as chief? A. In 1902?

Q. Yes? A. It varies from twelve to fourteen. I don't remember the exact number.

Q. I show you a paper [market] "In case 13778 C", and ask you to state whether you ever saw that paper, and if so when you first saw it? A. (After examining paper): This paper was received in my office and made a record in my office on the 10th day of November, 1902.

Q. What was done with it then? A. On November 14, 1902, it was referred to Post Office Inspector M. G. Price for investigation.

Q. I will get you to state whether or not that, with the number as given on that, has been in charge of your office since the time of the receipt of that letter? A. It has been.

Q. State whether or not other complaints not included in the complaints of Hout and Evans were subsequently forwarded to you from the Post Office Department in that same case? A. They were, and numbered.

Q. Has there ever been, by your office, or by you, a final report, what you call a final report, made to the Chief Inspector at Washington in this case?

Objected to by counsel for defendant as immaterial. Objection overruled, for the reasons before stated, if the case was

pending before the department at the time the alleged offenses were committed here.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. There has not.

Cross-Examination,

By Judge Krum:

Q. Mr. Price made an investigation with reference to this so-called complaint of Bella Evans and Mrs. Hout after it was referred to him by you, didn't he? A. He did.

Q. He made a report to you, didn't he? A. I don't recollect that he made any written report.

Q. Did he make an oral report? A. He made an oral report that he did not conclude his investigation in the case.

Q. Did he investigate it further after he made the oral report? A. It was again investigated in August, July and August, of 1903.

Q. About what time did he make the oral report to you? A. I do not recall that.

Q. How soon after the 14th of November, if you can fix the date? A. It was soon thereafter, because my recollection is he took it up at once.

Q. Within a day or two wasn't it? A. I think so.

Q. Now, what was the report that he made? A. Well, his report at that time was to the effect that the two complaints were not of such a character as to warrant action in the matter of a recommendation of a fraud order, or something of that kind.

Q. Do you recall whether, after having given you that indication, Mr. Price made any further investigation of the complaint of Bella Evans and Mrs. Hout, do you remember as to that? A. That may have been taken up in connection with a number of other complaints at the time of the investiga-
99 tion by Mr. Price and Mr. Piatt.

Q. That was later, sometime in 1903? A. Yes, sir, that was in July and August, 1903.

Q. You don't recall, do you, whether,—after this matter had first been referred to Mr. Price and he had given you this indication that you have furnished us,—he did anything further until the general investigation of the affairs of the Rialto Grain and Securities Company which took place in July or August of 1903? A. In July and August, 1903, yes sir.

Q. Mr. Dice, I show you this original record of the office at Washington. (Hands paper to witness.) Is there anything about it, taking, for instance, that entry in regard to Fravel; is there anything about it that recalls to your recollection when that was received here in St. Louis, at your office? A. The Fravel complaint?

Q. Yes. Or is there a record here, Mr. Dice, from which by turning to it you can tell when it was received here in St. Louis? A. No sir, there is not. These files that are forwarded here under the file number, are simply filed in the case without any further record in the office.

Q. Do you recall the receipt of that particular matter here? A. That particular matter, I do not.

Q. So you would not be able to tell us, perhaps, what action was taken by yourself in regard to it; or have you any definite recollection in regard to that particular complaint? A. I have no distinct recollection in regard to that particular complaint. If it was sent on the 8th, it should have been received here on the 10th, and would be, in the natural course of business, filed in that case "13778 C".

100 Q. And then it would be turned over, wouldn't it, to some one of your subordinate inspectors? A. If the case was in the hands of an inspector, which was the case on the 14th, it was referred to Inspector Price. If that reference had been received after the case had been referred to him, the file would be referred to him for the filing of the case.

Q. It would go into his hands? A. Yes sir.

Q. Do you recall whether Mr. Price made any report of any description with reference to this Fravel incident? A. If the Fravel incident is mentioned it must be in his report of August 20, 1903.

Q. That is the formal report that was made after that general investigation— I mean, along in November, 1903, after the receipt of this paper in your office, do you recall any report made by Mr. Price in regard to it? A. No sir, I do not.

Q. This is shown, that the complaint of Arthur M. Allen was referred to your office January 5, 1903. That would bring it here, say, on the 7th of January, 1903. Mr. Price had the other matters in charge and that would be sent to him, wouldn't it; the probability is that was turned over to him? A. If the case was still in his hands that would be referred to him in my office.

Q. And that would be the situation in regard to the complaint of S. A. Warner, which appears to have been sent to your office on the 21st of January, 1903, wouldn't it? A. It would.

Q. You are not able to recall, are you, whether Mr. Price, if he had charge of these last matters, made any report to your office in regard to them until the final examination therein in the summer of 1903? A. He did not make a final report, he made a special report in August in connection with in-

101 spector Piatt.

Q. That was the result of a full investigation of the affairs of the business of the Rialto Grain and Securities Company? A. It was.

Q. Which was begun in July or thereabouts, of 1903, or was it earlier than that? A. July and August, 1903.

Q. During that months—Mr. Price and who else? A. Inspector Piatt.

Q. They made a full examination of the affairs of the company and reported to you as Chief Inspector in charge here? A. Yes sir.

Q. And between November and the time of this full investigation, do we understand you that no report was made except as you have indicated, by Mr. Price in the month of November? A. No written report that I recall.

Q. The only report, other than the written one which was made in August, 1903, is the oral report you have indicated? A. Yes sir.

Redirect Examination.

By Mr. Dyer.

Q. Mr. Price was an inspector under your charge and direction, was he? A. Yes sir.

Q. All reports made by him or any other inspector in this division, was to be made to you, and you, as Chief Inspector, could approve or reject the report made by your subordinate, is that true? A. Yes, sir.

Q. Now, as I understand you, whatever examination was made by Mr. Price in November, 1902, was a report made verbally to you of it in which he had not concluded the examination? A. That is right.

Q. And that examination of that concern was before
102 you as inspector in charge from the time it was first made up to the present time? A. It was.

Q. These reports about which Judge Krum has asked you, in July, and August, 1903, were partial reports in reference to this particular matter, but no final report has been submitted by you to the Post Office Inspector in charge at Washington? A. Yes sir.

Q. That is true, isn't it? A. This case, since its receipt in my office on November 10, 1902, has been a subject of consideration since that time. There has never been a final report made; the case is still pending, in the hands of my office.

Q. And the papers forwarded to you have never been returned to Washington? A. Have never been returned to Washington; they are files in the office; the case taken up by Mr. Price and partial investigation by Mr. Price, and action taken so far as the court here is concerned, in July and August of last year.

Recross-Examination

By Judge Krum:

Q. When did the company go out of business? A. The Rialto Grain and Securities Company?

Q. Yes sir. A. I do not know that it is out of business.
Q. Hasn't it been out of business for a good many months? A. I do not understand so.

W. E. Cochran a witness of lawful age, produced, sworn and examined on the part of the United States, testified as follows:

103 Direct Examination,

By Col. D. P. Dyer:
Q. Your name in full? A. William E. Cochran.
Q. Your place of residence? A. I am residing temporarily at Washington, D. C.
Q. Your official position? A. I am Chief Post Office Inspector.
Q. How long have you been Chief Post Office Inspector? A. Since late in 1898.
Q. Prior to that time were you inspector in the Post Office Department? A. Yes sir.
Q. How long have you been connected with the Postal service? A. I became a post office inspector in 1891; before that I was clerk in the office of the auditor of the Post Office Department, from 1884 to 1891.
Q. Where is your office at Washington located? A. It is on the 4th floor of the Post Office Department building.
Q. I want to ask you to identify certain papers, if you can, that I will present to you, with a view to ascertaining the course of business through the Post Office Department, if you know. I show you the letters of Bella Evans and Mrs. K. C. Hout, and ask you to state whether or not you recognize that as the stamp used in your office upon receipt of such letters? [Q.] (after examining letters): Yes sir, that is the stamp of the distributing clerk.
Q. Now, will you state to the Jury what the course of procedure is in the department upon the receipt by the Post Master General of letters of that kind, or these particular letters; what is the course of procedure, and what is done by it,
104 and how the department operates upon that information? A. A letter received by the Post Master General alleging a violation of the Postal Laws or Postal Regulations, would come down to my division; it would go to the distributing desk and by the distributing clerk be sent to the "C" section for jacketing.
Q. Then what course would it take after that? A. There would be some examination made of it to see whether it properly justified—whether there was enough in it to warrant an investigation, and if the conclusion was that it should be properly investigated, a case is made up and referred to the in-

spector in charge of the division in which the alleged violation occurs.

Q. Will you state how many divisions there are? A. There are fifteen divisions.

Q. And the headquarters of one is in St. Louis? A. Yes sir.

Q. —of the fifteen divisions? A. One of the fifteen.

Q. Now, the officer in charge here, for instance, Col. Dice, is designated as Post Office Inspector in Charge, is he? A. Yes sir.

Q. And through him your correspondence and all correspondence with this division is had? A. Yes sir.

Q. You have no correspondence with any subordinate from here, unless especially detailed by you, have you? A. No sir.

Q. Anything referring to this division is referred to the inspector in charge who, under your rules and regulations, has a right to designate some employe, some other inspector, to do the work? A. Yes sir.

Judge Krum: I submit that if Col. Dyer would try
105 real hard, he might make a leading question out of that?

Col. Dyer: Q. This particular case that you have now in your hands, will you state whether that case has been pending before the officers of the Post Office Department since the receipt of these letters?

Objected to by counsel for defendant, on the ground that it calls for a conclusion.

The Court: The objection is well taken.

Col. Dyer: Q. I will get you to state whether that paper was referred to Col. Dice? A. It was.

Q. When was it referred to Col. Dice? A. On the 7th of November, 1902.

Q. Will you explain when a case, under your rules and regulations, is concluded, when it is ended? A. As far as my office is concerned, it is concluded when the investigation is finished and final report made and proper disposition made of it by my force.

Q. When properly disposed of in your office? A. Yes sir.

Q. And not until then? A. Not until then.

Q. Now what is the course of proceeding in the event that an investigation for fraud is had, and it comes back to you from the Post Office Inspector in charge here, say Col. Dice, recommending that an order be issued by the Post Master General, known as a fraud order, what course does it take after it reaches your office then? A. It would be referred to the office of the assistant Attorney General of the Post Office Department for his consideration and action.

Q. Under whose immediate direction are you?

The Court: After he investigates he reports his con-
106 clusions to the Post Master General for his action?

A. Yes sir, in case he considers a fraud order not warranted, he probably would not submit it to the Post Master General at all.

Col. Dyer: Q. In case he did, what then? A. Then he would submit it to the Post Master General.

Q. Who is your immediate superior? A. The Fourth Assistant Post Master General.

Q. I have offered and read in evidence here certain sections and provisions for the government of the Post Office department known as "Rules and Regulations": I will get you to state whether there are any other rules and regulations not embodied in this book that are issued to Post Office Inspectors? A. There are.

Q. Under section 45 at page 47 of the postal laws and regulations, is this section that I have read in evidence before; special regulations for the instruction and government of inspectors are prescribed in the book, instructions which are confidentially furnished each Inspector. Obedience and conformity to these regulations, and a strict observance of their secrecy are enjoined: I will get you to state whether you have in your possession such regulations issued in pursuance of that section now? A. I have.

Q. Will you produce them?

Judge Krum: I submit these are not competent.

Col. Dyer: Are these instructions contained in this book I hold in my hand, delivered to each Post Office Inspector? A. They are.

Q. And I will ask you whether these instructions are signed and given to them by the Post Master General? A.
107 They are signed by the Post Master General and referred to me to be given to the Post Office Inspector.

you

Q. To be given through to the different inspectors? A. Yes.

Q. Were these instruction- in existence in 1902 and 1903? A. They were.

Q. Do these instructions contain directions as to what shall be done in the examination of fraud cases? A. Yes sir.

Q. I show you this book, and ask you whether this book and these instructions were promulgated by Charles Emory Smith Post Master General of the United States? A. They were.

Q. I will ask you whether Sections 49 and 50 of these instructions—whether that is the course pointed out by that, to

be followed by these inspectors; whether that was part and parcel of the way of making examination of these charges of fraud through the Post Office department of the United States? A. Yes sir.

Col. Dyer: I offer Sections 49 and 50 of these Postal Rules and Regulations.

Q. In conducting cases of this kind, as was done in this case, each case is given a number? A. Yes sir.

Q. And by that number complaints existing, and complaints that might follow the first are given the same number, given the same jacket, and form a part of the same case; is that true? A. Yes sir, that is right.

Q. Any subsequent complaints made against this Rialto Grain and Securities Company, subsequent to the time the jacket was made in the Hout and Evans matter, would be numbered the same as that, and come in that case? A. Yes, they would be, if the regular course was followed.

108 Q. Under the Rules and Regulations of the Department, and the course of business followed there, at any time you had authority to direct Col. Dice to discontinue the examination of the case, and return it to you; is that true? A. It is.

Q. You had absolute control of this matter while it was pending in your department? A. Yes sir.

Q. And the fact that it was sent to Col. Dice for examination from the department was in accordance with the rules and regulations of the department for the purpose of better enabling the Post Office Department to make the examination?

Objected to by counsel for defendant, as not proper.

The Court: That is rather leading: The objection is sustained. He may state the purpose, if you want.

Col. Dyer: Q. You may state when these complaints were made at Washington to the Post Office department, why was it referred to the Post Office Inspector here in charge instead of being examined by you at Washington?

Judge Krum: I submit that is not for this witness to determine.

The Court: I think that is a matter which is determined by the rules and regulations and the procedure of this department. According to the testimony and the regulations, it is sent out here for investigation, and returned to the department for action upon it. There is no use sifting it through this witness.

Col. Dyer: I offer in evidence section 49 and 50 of this book Postal Rules and Regulations, which the witness says, is part and parcel of the department.

Mr. Lehmann: We object to that. Everything that can possibly be competent is already offered—that is, what was done. These sections are something in the way of advice, instruction on law, some instructions as to how to conduct the secret service, all of which are not relevant here at all. The evidence as to what was done in this particular case, has already been received.

Objection sustained, to the reading of sections 49 and all that part of section 50 except the last paragraph of it, because it appears to be but a resume of the law on the subject, and general instructions to Post Office inspectors. But this last clause has special relation to what they should do in connection with matters that are perhaps germaine to the inquiry before the Court.

Mr. Lehmann: I wish to add to the objection we made, that the instructions, being secret and not known to the defendant, could not possibly connect him in respect to it.

The Court: There is nothing in here which bears upon the case except the precedure of the Department whether a fraud order is proper or necessary, and that is all I allow here in connection with this trial.

The District Attorney here reads the last twelve lines of Section 50 of the postal Laws and Regulations, as follows:

"The authority to prohibit the delivery of mail matter or payment of monty orders, is conferred only on the Post Master General and must never be assumed by an Inspector. In cases where it may be necessary that such action be immediately taken, the Inspector will communicate by wire with the Inspector in charge of his Division, who may advise the Department, stating briefly the reasons for the action desired, and a temporary order can then be issued by the Assistant Attorney General for the Post Office Department, through the Inspector, pending a consideration and hearing, looking to the issue of a formal fraud order".

Col. Dyer: I have not asked this witness to identify certain letters, as they have been already identified.

Judge Krum: There is no dispute about them.

The Court: There is no necessity for any further identification of those letters. There is no dispute about them, no question about them.

Ernest H. Kastor, a witness of lawful age, being duly produced, sworn and examined on the part of the United States, testifies as follows:

Direct Examination,

By Col. D. P. Dyer:

Q. Your name is Ernest H. Kastor? A. Yes.

Q. You live in St. Louis? A. I do.

Q. And your business? A. Secretary and Treasurer of the H. W. Kastor & Sons Advertising Company.

Q. Are you acquainted with the defendant, Senator J. R. Burton? A. Yes sir.

Q I will ask you to state, Mr. Kastor, whether in November, 1902, you went with the defendant to the Rialto Building in this City, in a carriage? A. I did, sometime along there.

Q. What time in the day was that? A. It was sometime near noon—I do not recollect the exact hour.

Q. When you went to the Rialto Building on the corner of Fourth and Olive Streets, did you see Major Hugh C. Dennis? A. Yes sir.

111 Q. Did you introduce him to Senator Burton? A. I don't think I did at that time. I think I introduced him to Mr. Harlan on that day.

Q. You introduced him to Mr. Harlan? A. Yes sir.

Q. At that time? A. Yes sir

Q Did you see Mr. Dennis that day? A. Yes sir

Q. Who introduced him to the Senator? A. I think it was my brother that introduced him.

Q. At the same time, on that same day? A. I think it was on that same day he introduced him.

Judge Krum: I think we can safely admit they became [acquainted.]

Q. (Col. Dyer resuming) who, in company with you and Senator Burton went down to the Rialto Building? A. My brother—who in company with?

Q. With you and Senator Burton? A. My brother.

Q. Which one? A. Ben—B. H.

Q. How long did you remain there at that time? A. Just a few moments. I don't recollect just how long, but it was a very short time.

Q. What was said there at that time by Dennis to Burton, or Harlan to Burton at that time? A. I think the Senator made the statement that he was obliged to take that Mid-day train to Chicago and it was only a few minutes to catch it, and there was very little said, except that Major Dennis said that his attorney would go along to Chicago with the Senator, and they would—

Q. By Judge Krum: Mr. Harlan, you mean? A. Yes sir, Mr. Harlan, and they would speak about the matters at that time.

Q. (Col. Dyer resuming) Speak about what matters. Did they say anything? A. Not at that time they did not.

112 Q. Had you previously gone to Dennis about the matter and spoken to him about seeing Senator Burton? A. I do not recollect I did. I think I spoke to Mr. Harlan. I don't recollect whether I spoke to Major Dennis about it or not.

Q. Mr. Harlan was attorney for the Rialto Grain & Securities Company? A. Yes sir.

Q. How long before the day you went there with Burton had you spoken to Mr. Harlan about Senator Burton? A. I do not recollect. I do not remember.

Q. How long altogether did you remain at the Rialto Building with Senator Burton and Major Dennis? A. We did not go into the building at all. We went in the carriage with the Senator, and it was just a few moments we staid there, and immediately drove to the train, if I recollect.—

Q. That is to say, not to get ahead of it, you did not go into the building, and the conversation that you allude to was had between Dennis, Harlan and Burton, on the sidewalk? A. Yes sir.

Q. While standing talking to the Senator in the carriage? A. Yes, sir.

Q. And after that conversation was over, who got into the carriage then to go to the depot? A. Mr. Harlan, Senator Burton, my brother and myself.

Q. After getting to the depot, how long before you left the depot to go to Chicago, how long before Senator Burton left? A. It was a very short time. We had very little time, as I recollect it.

Q. Who went with him, if anyone, to Chicago?

Judge Krum: Who is "him"?

Q. (Col. Dyer resuming) Who went in company
113 with the Senator to Chicago that day? A. Mr. Harlan and myself.

Q. You occupied the same car? A. Yes, sir.

Q. What time did you get to Chicago? A. I think it was in the neighborhood of 8 o'clock or thereabouts—8 or 9 o'clock —something of that kind.

Judge Krum: Morning or evening?

Q. (Col. Dyer resuming) In the evening you got there? A. Yes, sir, in the evening.

Q. You left here at noon? A. Yes, about noon.

Q. By the Court: What day of the month was that—what month—when? A. I do not recollect the day, but I think it was in November. It was sometime before the Holidays. I do not recollect the day.

Col. D. P. Dyer: We will locate the time.

Q. (Col. Dyer resuming) Can you state when you returned to St. Louis? A. We returned the next morning. That is, we left Chicago that same night.

Q. By Judge Krum: By "we" you mean whom? A. Mr. Harlan and myself.

Q. (Col. Dyer resuming) You parted with the Senator there? A. Yes sir, at Chicago.

Q. And you and Mr. Harlan together returned to St. Louis the next morning? A. Yes, sir.

Q. Now what was said, if anything, between Mr. Harlan and Senator Burton on the way to Chicago, about the employment of the Senator? A. Well, certain matters were taken up about the Senator—

Judge Krum: State all that was said, if you please, as near as you can recall, all of it? A. I have gone over this matter recently to clear my mind as much as I possibly could on the points in the matter, after I was subpoenaed as a wit-
114 ness, to recollect as much of it as I could:

Judge Krum: That is what we want to get, all you can recall of it?

A. As I recall the conversation, it was taken up about the Senator becoming counsel for the Rialto Grain & Securities Company—

The Court: You are requested to state what was said.

Q. (Col. Dyer resuming) What was said, and who said it, to Senator Burton, about him becoming counsel for the company? A. Why, Mr. Harlan spoke to him, about becoming counsel for the company, and the Senator asked him what should be done, or words to that effect, and as far as I can recollect at that time Mr. Harlan spoke about some legal matter coming up in regard to the old Brooks Brokerage Company, in which Mr. Brooks was connected at that time; and that maybe the Senator would be needed in that. And they also spoke about some literature that was being gotten up for the Rialto Grain & Securities Company, or was up, I don't recollect which, in the way of booklets; and stated that they would want him to go over that literature for the purpose of seeing if there was anything in it that was against the postal laws or regulations; and wanted him to act as counsel for the com-

pany. And if I recollect aright, something was mentioned about the Senator's name being placed on the literature as Chief Counsel.

Q. What was said about the money that was to be paid him, if anything? A. Well, the matter of the money was taken up and was satisfactorily arranged—

Q. i want to know what was said. I don't want to know whether it was satisfactorily arranged. I want to know what was said about it.

115 The Court: State what was said.

A. I think there was something stated about $2500 being paid to him.

Judge Krum: What is that.

A. About the Senator receiving $2500, and I think it was arranged to be paid at different periods. That is not so clear in my mind.

Q. Where was this conversation—was this conversation on the cars? A. Yes.

Q. In the conversation in reference to this compensation, after you got to Chicago, or was it all arranged before you got to Chicago? A. I think it was arranged in such a way that Mr. Harlan was to let the Senator hear from him.

Q. That is, was there anything said about him submitting the proposition of the employment and the terms of the employment to the Rialto Grain & Securities Company at St. Louis, and then to be heard from? A. I think there was, yes, sir.

Q. Now what was said about literature and booklets that were to be issued by this Rialto Grain & Securities Company in that conversation? What was Senator Burton to do about this literature? A. As I understood it, he was simply to look over the literature and give advice as to whether it was in accordance with the rules and regulations.

Q. That is to say, whether it was permissible to go through the mails? A. Yes sir.

Q. Was there anything said in that conversation about the Old Brooks Brokerage and Commission Company other [that] that company had gotten into trouble, and this company had been organized upon its own hook? A. Well, there was something said that the Senator might be called upon, and in the capacity of counsel, that there was [something] coming
116 on, I don't know whether there was an indictment at the time, or they feared an indictment, or something of that

kind; and it was arranged I think, that they were to telegraph the Senator, or inform him if they wanted him here in St. Louis.

Q. What was said about this literature? What was said further about it? Was there any literature shown to him at the time that had been originally issued by the Brooks Brokerage Company? Did you have some of that [lietrature] along and submit that to him? A. I did not, and I do not recollect whether there was any shown at the time or not.

Q. Well, what was said about—What further was said if anything, about what he was to do in reference to this literature? A. I do not recollect that there was very much further said. That has been [someting] ago, and I do not recollect the entire conversation.

Q. Have you stated as fully as you can all that occurred between here and Chicago in reference to this employment, and what occurred? A. I recollect that Senator Burton made a statement regarding that he could not act before the Departments.

Q. In what way, did he say? A. Well, there was different matters came up there about the Rialto Grain & Securities Company—and in fact I have personally spoken to the Senator before about them. We were at the time handling a great deal of advertising for these parties, and I told him that—

Q. You need not tell what you told him. I am talking about what Mr. Harlan told him.

Judge Krum: You mean you told the Senator this when Mr. Harlan was there, or you told him before that time? A. Before that time.

117 Q. (Col. Dyer resuming) I want to know all that was said between Mr. Harlan and Senator Burton on the way to Chicago, and after they got to Chicago, about his employment? A. Well, I have told about all I can recollect. I cannot remember very distinctly anything further.

Q. You do not know anything further that was said beyond that his duties were to examine the literature and decide whether it was mailable or unmailable matter, and allusion to the old Brooks Brokerage Company: Anything further than that? A. Well, that he should act as Chief Counsel for the concern, and that his name should appear as Chief Counsel, and that if anything came up in legal matters in St. Louis, they were to wire or communicate with him.

Q. Do you know, as a matter of fact, whether his name was afterwards published on their literature that went out, as Chief Counsel?

Judge Krum: We will admit it was.

Q. (Col. Dyer resuming) Did you print it? A. No, sir.

Q. You, I suppose, have talked about this matter some recently, haven't you? A. Yes sir.

Q. And you have also talked with Senator Burton about this matter? A. Yes, sir, I conferred with him about it.

Q. How many times have you conferred with him since this indictment was found in reference to this matter? A. I have conferred with him since I was subpoenaed as a witness, some two or three times, I think.

Q. Where did you meet him? A. I met him at the Southern Hotel, and I met him in our office.

Q. And you think as many as three times since you were subpoenaed? A. I think so. I am a good, personal friend of the Senator's.

Q. You have conferred with him in reference—did you talk over what had transpired on the train? A. Yes.

118 sir.

Q. And in each conversation, did you go over what had transpired on the train? A. Not particularly. I was the one that brought up the subject to the Senator. I told him it was not clear in my mind and I supposed I would be asked these questions, in order to clear my mind as far as possible in the matter.

Q. What was said, if anything, by Mr. Harlan, about trouble with the Department, to Senator Burton? A. I do not recollect that anything was said at the time.

Q. What was said, if anything, about the necessity of examining this literature to see whether it was mailable or unmailable matter. What was said about that? A. Well, Mr. Harlan wanted—they wanted to keep themselves out of any trouble. The Brooks Brokerage Company had got in trouble, and they wanted to guard as near as possible, as I could understand, from a repetition.

Q. Of the trouble they had had with the Brooks Brokerage Company? A. Yes, sir.

Q. And then it was that suggestion was made as to the examination of this literature? A. Yes, sir.

Q. Was there anything said in that conversation about submitting to the defendant, Senator Burton, the literature that might be made up to be sent out to people? A. Yes, sir.

Q. That literature was to be submitted to him? A. There was reference made that they would submit literature and wanted him to go over literature when they would submit it and give his opinion on it, as far as I can recollect.

Q. Was there anything said in that conversation, to your knowledge, to submit this literature to the proper Post Office officials to see whether it could properly go through the mails or not? A. I think there was some such thing said.

119 Q. By whom was that said, Mr. Harlan or Senator Burton? A. I think by Mr. Harlan. I will state that I do not recollect that clear enough to state absolutetly on my oath.

Cross-Examination

By Judge Krum.

Q. Mr. Kastor, your recollection as to what occurred between Senator Burton and Mr. Harlan is not distinct as to all of the details of the matter? A. No, sir; not as to all the details of the matter.

Q. Since this case has been set down for trial you have had several conversations with Senator Burton? A. Yes, sir.

Q. In which you have endeavored to recall all—that is, the details of the conversation between Mr. Harlan and himself, haven't you? A. Yes, sir.

Q. You have also had some talks with me in the same direction, haven't you? A. Yes, sir.

Q. Now you have indicated that in some way the sum of $2500 was spoken of: Have you any distinct recollection in regard to that matter, or, do you just recall it in a general way? Are you able to give us, or have you at any time since that conversation been able, to recall the details with reference to this matter of $2500, so you can intelligently explain to the jury what was stated in that respect? Was the sum of $2500 indicated, which was to be paid to Senator Burton as a specific sum, or was there anything indicated on the part of Mr. Harlan as to payment to be made to the Senator which would amount to $2500, or what was said? A. Well, I think the sum of $2500 was indicated, but it was to be paid at certain times.

Q. Let me recall to you if I can what occurred: Of course matter of compensation was spoken of? A. Yes, sir.

120 Q. No doubt about that? A. Yes, sir.

Q. Now did not Mr. Harlan suggest the amount of compensation, and didn't he suggest too to Senator Burton that he thought $500 a month would be proper compensation for him in reference to the matters in regard to which he was employed or to be employed—or what is your recollection upon that subject? A. I believe there was some thing of that kind said by Mr. Harlan, and if I recollect right, Senator Burton then spoke of $2500 as the amount to reach that sum, and that he should be paid in monthly installments, if I recollect right.

Q. Can you recollect this: That after Mr. Harlan indicated this amount of compensation, or method of compensation, that compensation the company would agree to, Senator Burton agreeing to that himself, indicated that the sum agreed on to be paid monthly, should be paid to him in advance, and that as it would not be fair in his judgment to cut him off with one month's payment, they should contemplate a continuance of the

arrangement sufficiently long at least to cover $2500: Do you recall anything of that kind? A. I recall, but I do not recall it just that way, but I recall the statement made was, that if should reach $2500 and that it should be paid in monthly installments. That he should receive so much a month, but the amount should not be less than—

Q. Not less than $2500? A. Yes, not less than $2500.

Q. And that he should be paid in monthly installments? A. Yes sir.

Q. Now the employment, as I understand you, was in the first place as General Counsel, for the Rialto Grain & Securities Company? A. Yes, sir.

Q. And that company, as you understood, didn't you,
121 Major Dennis was the principal stockholder of? A. Yes, sir.

Q. And substantial owner of it? A. Yes, sir.

Q. So that Mr. Harlan's proposition was, that Senator Burton should become the General Counsel of the Company, that this literature which the company purposed to issue from time to time, should be submitted to Senator Burton for his approval or criticism? A. Yes, sir.

Q. And that Senator Burton should appear for Major Dennis here in St. Louis in this Court, or in the State Court, if Major Dennis was indicted by reason of the transactions of The Brooks Brokerage Company: Wasn't that the arrangement? A. Yes sir.

Q. Now have you any definite recollection as to what Senator Burton said in regard to matters before any of the departments, or matters before the Post Office Department: Let us have your best recollection you can afford us? A. I recollect there was a statement made, but I don't know just exactly the language of it. I was not very deeply interested in it—that the Senator stated something, that he could not act in a case before the Department, or words to that effect. I don't recollect exactly.

Q. Are you able to indicate to the jury how that happened to be mentioned by the Senator? Can you indicate in what connection that indication was given by him? A. It was in the connection that he was to be General Counsel. As near as I can recollect, at that time, that he could act as General Counsel, except——

Q. That is, he was not to appear in the matters in the Departments: He indicated that, didn't he? A. Yes, sir.

Q. He was willing to accept employment as General Counsel of the Company? A. Yes, sir.

122 Q. With that limitation? A. Yes, sir.

Q. That his employment should exclude the idea of his appearing before the Departments? A. Yes, sir.

Q. That is substantially it? A. Substantially, yes, sir.

Q. With reference to the Brooks Brokerage Company, you were given to understand, weren't you in the course of that conversation between Messrs. Harlan and Burton, that Major Dennis had been interested in the Brooks Brokerage Company as its principal owner? You were given to understand that? A. Yes, sir, I knew that.

Q. And that Brooks and Dennis had become involved by reason of the operations of that company? A. Yes, sir.

Q. And that, Mr. Harlan indicated, didn't he, to Senator Burton, that there was room to believe Major Dennis would be indicted, and it was accordingly arranged that the employment of Senator Burton should also cover the criminal cases which might be brought against Dennis? That is a fact, isn't it? A. Yes, sir.

Q. Down to the time when you first, or your brother, introduced Senator Burton to Major Dennis, are you aware of any knowledge on the part of Senator Burton either in regard to Major Dennis or the Rialto Grain & Securities Company? A. No, sir; none.

Q. So far as you know, it is a fact, isn't it, that down to the day when Senator Burton and Mr. Harlan and yourself went to Chicago, Senator Burton was in complete ignorance of any of the affairs of the Rialto Grain & Securities Company of the Brooks Brokerage Company or Major Dennis himself? A. To the best of my belief he was, yes.

Q. Whatever information was afforded Senator Burton in regard to any of these matters, so far as you know, he
123 acquired that day: That is a fact, isn't it? A. So far as I know, it is, yes.

Q. It was practically by your suggestion that Senator Burton was brought into this employment? A. Yes, sir.

Q. Are you able to recall, Mr. Kastor, anything said by Mr. Harlan with reference to the line of business which the Rialto Grain & Securities Company purposed to follow? A. I recollect stating to myself to the Senator something about it.

Q. Let me see what I can do to refresh your memory: Do you remember that Mr. Harlan indicated to the Senator that the company purposed to deal in grain and other commodities, and stocks? A. Yes, sir.

Q. That it was a sort of a hobby on the part of Major Dennis to have as one of the leading features of the business of this company the placing of securities throughout the country? A. Yes, sir.

Q. You recall anything of that kind? A. I recall speaking to the Senator about that myself.

Q. From whom had you—

Col. Dyer: Are you recalling any conversation between him and Major Dennis?

Q. (Judge Krum resuming) Do I understand you to say that you had indicated to Senator Burton what the business of the company would probably be, or what they had in mind? A. Yes.

Q. Was this before you had introduced him to Mr. Harlan? A. I think it was on that same day that I spoke to him.

Q. Before or after they had met? Was it on the run up to Chicago? A. I think it was.

Q. Wasn't that feature discussed at considerable length between Mr. Harlan and the Senator—this feature of the placing of securities?

124 At this point recess was taken until 2 p. m.

After recess the following proceedings were had.

Q. Previous question read to the witness. What is your recollection as to that? A. The feature of placing securities by the Rialto Grain & Securities Company?

Q. Was that discussed between Mr. Harlan and Senator Burton? A. I recollect speaking to him about it. I do not recollect so much—

The Court: Speak louder.

A. (continued) I recollect speaking personally to the Senator about the placing of securities, etc.

Q. You do not recall whether Senator Burton or Mr. Harlan spoke of that? A. I do not recall distinctly whether they spoke of that.

Redirect Examination

By Col. D. P. Dyer:

Q. Where did you first know Senator Burton? A. I do not just recollect. I believe it was in our office I first met him, I do not just recollect.

Q. Had you any interest, directly or indirectly, in this Rialto Grain & Securities Company? A. No, sir, except that I was placing their advertising.

Q. You were placing their advertising? A. Yes, sir.

Q. That is, their advertisements put in the papers? A. Yes, sir.

Q. Did you have anything to do with printing their booklets? A. No sir.

Q. It was only in newspapers. In how many newspapers in the country did you place their advertisements? A. Oh, a good many, quite a number; pretty well throughout the United States.

Q. All through the United States? A. Yes, sir.

125 Q. Of their advertisements? A. Yes, sir.

Q. Did you submit those advertisements to Senator Burton? A. No, sir.

Q. Did you ask him anything about those advertisements? A. I think not. They were O.K'd by the company, the advertisements were, by the Rialto Grain & Securities Company.

Q. And this Rialto Grain & Securities Company was paying you for putting out those advertisements throughout the country? A. No, sir, we represented the newspapers. We get our money from the newspapers.

Q. That is to say, the Rialto Grain & Securities Company would pay the newspapers a certain amount— A. No, sir; we did the collecting. We do the collecting for the newspapers, but we receive a commission from the newspapers.

Q. And when you went to them, went to this Rialto Grain & Securities Company and took Senator Burton there, you supposed from your knowledge of Senator Burton that if they were in any trouble with the Post Office Department, he would be a good man to have. Didn't you think so? A. I first took the Senator there more out of friendship to Senator Burton, as he had given our firm quite a litle assistance in the way of giving us letters, etc., where we had secured accounts. He had assisted us on several occasions to secure accounts, and when this matter came up I spoke to them of Senator Burton and thought he would be a mighty good man.

Q. Didn't you say in that conversation, or did you say, that Senator Burton's knowledge gained through the Weltmer case at Nevada, Missouri, would be of service to them? A. I don't know but what I did make that remark.

Q. Didn't you tell them that Senator Burton represented Weltmer before the Post-Office Department and that

126 fraud orders were issued by the Post Office Department against this Weltmer Company?

Judge Krum: We object to that. In point of fact this all occurred before Senator Burton was a senator.

Mr. Lehmann: There is no pretense, that that was when the Senator was present.

Judge Krum: It has nothing to do with this matter.

The Court: Of course that is an immaterial issue and not to be tried, but with the view of calling his attention concerning services to be rendered in the Post Office Department, the witness' atttention might be called to that conversation, with the view of refreshing his recollection, and that is all. The question of that other matter is not involved.

Judge Krum: We do not understand this to be directed to the conversation between Mr. Harlan and this witness and Senator Burton.

The Court: Let me understand that: Is this directed to the interview which you claim was had between Mr. Harlan, this witness and Senator Burton, as to what occurred at that time?

Col. Dyer: Yes, sir; and part of the same transaction. That it was that reason why he urged the employment of this man.

The Court: The reason he gave to the Rialto Grain & Securities Company? This witness' conversation with the officers of the Rialto Grain & Securities Company is not relevant unless Senator Burton was present.

127 Q. (Col. D. P. Dyer resuming) Was there any conversation between Mr. Harlan, Senator Burton and yourself, between here and Chicago in reference to the Weltmer case? A. I do not recollect any.

Q. Was there anything said in that conversation about the services rendered by Burton in the Weltmer case? A. I do not recollect that there was. I do not remember of any.

Q. Was there anything said by you in your own office before going to the Rialto Grain & Securities Company that day, about his knowledge of the Post Office Department by reason of his connection with the Weltmer case?

Judge Krum: Said to whom, Burton?

A. I think not: I do not recollect any.

Q. Was there ever any conversation had between you and Senator Burton with reference to his knowledge of the proceedings before the Post Office Department in the Weltmer case?

Judge Krum: We submit that is wholly immaterial anyway.

The Court: I think not. I think that is relevant to the issue.

A. I do not recollect anything. I remember something stated about the case between—I do not recollect any conversation of that kind, about the Post Office Department. I recollect a conversation when it was before the Supreme Court, the case

Q. Had you any conversation—before asking you that question, did you know as a matter of fact that the Weltmer Company had had a controversy with the Post Office Department?

Objected to as immaterial.

The Court: You may ask it preliminarily. I don't know what it may lead to.

A. Yes.

128 Q. And did you say to Senator Burton or to anyone in his presence, that his knowledge gained by his connection with the Weltmer case would be of advantage to this company?

Objected to by counsel for defendant as not competent.

The Court: I think it is. The objection is overruled.

A. I think I did.

Q. Weltmer was the person who ran what was known as a Magnetic Healing Institute at Nevada, Missouri?

Counsel for defendant object to what he was, or who he was, or anything about him.

The Court: I will sustain the objection about who he was.

Judge Krum: It has nothing to do with this case.

The Court: As far as it goes, it did; but this last has not, because that involves a subject of inquiry.

Q. (Col. Dyer resuming) When, after your return from Chicago with Mr. Harlan, in November, did you next see Senator Burton?

Judge Krum: We object to the inquiry, because it does not grow out of anything inquired of this witness in cross-examination. If material at all it is a matter in chief and should have been inquired of in the first instance by the Government.

The Court: I think you are right in the main. I require you to direct the attention of the witness specifically to any matter inquired of in cross-examination. Direct his attention to it, and I will see whether it is proper rebuttal.

Q. (Col. Dyer resuming) I will ask you this ques-
129 tion: You knew, at the time you recommended Senator Burton to the Rialto Grain and Securities Company, that the Brooks Brokerage and Commission Company, had had trouble before the Post Office Department?

Objected to as not competent.

Objection overruled.

To which ruling the defendant, by his counsel, then and there duly excepted.

A. I knew that they were in trouble, yes.

The Court: Answer the question. Did you know they had trouble before the Post Office Department?

A. I do not recollect. I think he was indicted for some cause or other, but whether it was for that purpose, I do not recollect.

Col. Dyer: Under a stipulation I have here, I will read a letter of November 18, 1902, being a letter from Mr. Harlan to Senator Burton.

Judge Krum: There is no objection to that letter.

(Letter from Mr. Harlan to J. R. Burton, dated November, 18th, 1902, is here read)

November 18, 1902.

Hon. J. R. Burton,
Senate Chamber,
Washington, D. C.

My dear Sir: Mr. Kastor and I arrived safely and on time this A. M. I found myself confronted with a number of engagements, which, together with Major Dennis' condition, preventing me from wiring you as early an hour as I expected. However, I hope you received my message to the effect that this company accepts your terms to act as counsel at a salary of $500.00 per month, said service to begin immediately; that is, of this date, November 18th, 1902.

I have been unable to get any definite information of the present proceedings before the Federal Grand Jury. You will recall that these proceedings grow out of the business conducted under the name of the Brooks Brokerage & Com-
130 mission Company, a business organized about the first of February of this year, by a man named C. H. Brooks. Brooks run the business to about the first of June, when he sold his stock to our client, Major H. C. Dennis, Major Dennis was then as he is now, general agent of the Hartford Life Insurance Company, and continued to give his attention to the life insurance business, transferring the management of the brokerage business to one E. C. Waldon, who had been Secretary of the Company under Mr. Brooks' management. Mr. Waldon had charge of all the details. About the 27th of July, Mr. Brooks, who was then in California, wired Major Dennis, to the effect that he would take a half interest in the business, back it with a credit of $50,000.00, and add new features. Such was the substance of the telegram. I am unable to give the exact wording at the present time, because it, as well as other telegrams that passed at that time, is in the hands of the Post Office Inspectors of this District. To the message of Brooks, Major Dennis answered that he could not accept the offer, as he had made other arrangements. Brooks thereupon wired to Waldon, who was still acting as Secretary of the Brooks Brokerage & Commission Company, asking Wal-

dron to join with him, Brooks, in a fight on Dennis, for the purpose of "busting" the concern. Brooks immediately left California, arriving here a few days later, and bringing with him a lawyer from California, and started a collection agency under the name of the "Guarantee Collection Agency", using the name of no individual, but sent out a false and libelous circular, charging the Brooks Brokerage & Commission Company with doing a fraudulent business, violating the State and Postal laws, etc., and soliciting from the former customers of the Brooks Brokerage & Commission Company (the names of said customers having been obtained by Waldon), and proposing in said circular to take claims against said Brokerage Company on the basis of 10%, agreeing to pay all court costs and other expenses. They succeeded in getting in a large number of claims, possibly one hundred and fifty, and filed about fifteen suits on said claims. At the same time, Brooks took the matter up with the Postal authorities, presenting to them some of the correspondence that he had collected through his collection agency, and by misrepresenting Dennis, brought about an

Hon. J. R. B. -2-

investigation by the Post Office Inspectors. This examination proved to be a little more than Mr. Brooks expected; every record, every letter or other scrap of evidence that could be produced was turned over to the Inspectors, and, though Mr. Brooks had taken with him his record books, and no doubt supposed that he had destroyed all evidence that might in any manner incriminate him, we succeeded in finding one letter-copy-book and two ordinary letter-files full of letters, all of which contained some damaging evidence against Mr. Brooks and it now looks as though Mr. Brooks would be indicted by the Federal Grand Jury now in session, on a charge of a fraudulent use of the mails. The Post Office Inspectors realize
that Major Dennis stumbled into the thing inadvert-
131 antly or at least innocently, and do not hesitate to say
so. They fear, however, to assume any responsibility, and we have directed our labors to avoid Major Dennis' name being mentioned in connection with that of Brooks in an indictment, should one be found. It is well recognized, that Mr. Brooks was actuated in this matter in a spirit of revenge, and later sought to "hold up" Dennis, by demanding $25000.00, as a condition not to prosecute in the Federal Courts.

The above facts, which constitute a mere outline of the present situation, will, I believe, be sufficient to show Major Dennis's present danger as well as his innocence on any wrong doing in the matter. That he is innocent, I know from my own knowledge; and I know also, as a man, that no one would do

more to prevent an intentional wrong than Major Dennis. Up to the present time, no indictment has been found. The Federal Grand Jury will probably be discharged this week. I do not know what reports have been sent into the Post Office Department at Washington, nor am I prepared to say that the Government intends to make a case against Major Dennis; but if you can find it convenient to inquire of these facts at the Department, you may be able to perform for us a great service at this time. Should any action be taken here by the Grand Jury, I will wire you at once.

Yours very truly,

THOS. B. HARLAN.

Col. Dyer: To that letter there came an answer, which I offer to read.

Judge Krum: We object to that because evidence has not yet been afforded which can render the letter competent as an admission on the part of the defendant in any regard. In other words, you cannot prove the corpus Delictu by the admission of the defendant.

The objection is overruled.

To which ruling the defendant then and there, by his counsel, duly excepted.

The Court: What is the date of that letter?

Col. Dyer: November 20, 1902.

The Court: That is in answer to the letter of Harlan of the 18th?

Col. Dyer: Yes, sir.

Judge Krum: If I may be permitted, the Court will
132 observe that the charge here is confined within very narrow grounds. That is, the receipt of compensation for a service rendered. There is not a word of testimony here as to any services rendered or as to any compensation received for a service rendered. Now it is proposed in the absence of any testimony on that score, to read what can be regarded only as an admission by the defendant. I respectfully submit that violates every rule applicable to such a situation under the law of evidence.

The Court: I think not. Here is a statement made by the witness with regard to the matter which is under inquiry, and every step of the case cannot be proved by the first witness or the first letter.

Judge Krum: It is not a mere objection to the order of proof.

The Court: What is your objection? That his admissions are not competent?

Judge Krum: At this stage his admissions are not competent.

The objection is overruled.

To which ruling the defendant then and there by his counsel duly excepted.

Counsel for the Government here reads the letter dated November 20, 1902, addressed to Thomas B. Harlan.

United States Senate,
Committee on Forest Reservations and the
Protection of Game.

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Nov. 20, 1902.

Mr. Thomas B. Harlan,
Rialto Grain & Securities Company,
St. Louis, Mo.

Dear Sir: Your favor of November 18th received. I called at the department this morning and find that there are two complaints lodged against your company. One by Bella Evans and the other by Mrs. K. C. Hont, both of Albany, New York. These complaints were sent out from the main office here for investigation on the 7th of November, and doubtless the inspector there has called your attention to them before now. If he has not, he will do so very soon.

I should like to be advised what there is in these complaints. Without knowing anything about the merits of the same, I would advise that all complaints receive special attention by your company, and if possible satisfy the complaints, especially should this be your motto until after this Brooks matter is entirely out of the way.

I have arranged with the department to be advised in case any complaints are made against your company, and have arranged for a hearing if any hearing should become necessary. I have assured the department that it is the (T. B. H. 2) purpose of your company to comply strictly with the law, and that it is your desire to remain at all times in perfect harmony with the department.

No action of any kind will be taken against you without my first being notified, and every opportunity for a full ex-

134 planation or hearing will be had.

In return, if agreeable, you may make remittance for my first month's pay.

Faithfully yours,

J. R. BURTON.

Judge Krum: I would like to have Mr. Harlan's reply to that letter read.

Col. Dyer: I will read that in its order as I take them up one after the other. I expect to introduce them all.

Col. Dyer: I offer now in evidence check of H. C. Dennis, President of the Rialto Grain & Securities Company, dated November 22, 1902, to J. R. Burton.

Judge Krum: Objected to if the Court please, on the ground that it is not competent for these reasons: It has been shown on the part of the Government that the contract of employment was made between the Rialto Grain & Securities Company and the defendant, under which he was employed by the company as its General Counsel at a compensation of $500 per month to be paid of course monthly. It has been shown on the part of the Government that this check was mailed in St. Louis to the defendant at Washington, D. C., as the first payment under that contract, the Government having shown that the check was mailed here at St. Louis to the defendant at Washington, D. C., as the first payment under that contract, it is to be presumed, in the absence of any testimony to the contrary, that the defendant received the check at the place to which it was sent by the mail. That being so, then insofar as the check evidences
135 a receipt of compensation by the defendant for any services rendered by him, the receipt of that compensation was had at the place where the defendant received the check—that is, Washington, in the District of Columbia, and not St. Louis, in the Eastern District of Missouri, and the gist of the evidence being the receipt of the compensation, of course there is no jurisdiction of this court to enter any counts of the indictment to which this check may be applicable; and this check as a matter of testimony is not competent, among other things, for the reason last indicated.

Now, the Government has alleged a series of services—that is, they have here a series of counts, each of which is based upon service. It does not appear from the language of the counts, except in a general way, that the service was the same. It is to be assumed in the absence of averments to that effect, that the service covered by each count was separate and distinct, or covered in any count was separate and [distince] from the service covered by the other count. The Court therefore, upon the theory of the Government, has this question presented: Where was the receipt of this compensation on the part of the defendant—conceding now that it was received—for the services rendered as laid in the indictment. Where was the compensation received? In the City of Washington, District of Columbia, or in the City of St. Louis, Eastern District of Missouri? We say the evidence shows conclu-
136 sively that the receipt of the compensation was in Washington, which independent of any other consideration in the case, operates to exclude this testimony. But, in addition to that, it seems to me there can be no successful contention that

the Government itself has proven that this check was never paid to Senator Burton, or never received by Senator Burton, as compensation for any service rendered in the Post Office Department, of the description laid in the Indictment, or any other service; that it was paid to him and received by him, as the evidence on the part of the Government shows, by reason of the contract that had been made with him as General Counsel of the Rialto Grain & Securities Company.

Now the Court will not have failed to have observed the provisions of the Statute. Your Honor has already demonstrated what the statutes signify, what the gist of the offense is, the receipt of the compensation. Your Honor has ignored all details of averment in this indictment, of which counsel for the defendant sought to take advantage, on the ground that those are practically irrelevant, that the point in controversy under each count is, Did the defendant receive a sum of money, as laid in some counts, or a check, as laid in others, as compensation for the services rendered of the description as laid in the counts. That is the controversy. Not was there a general employment as counsel. Not was there any employment. But did the defendant render the service which is laid in the count, and did he receive as compensation for that service the amount
137 of money or the check which is described in the count.

Now here they go on and show, according to all the evidence adduced, that this check never was sent to the defendant, and, therefore, it could not have been received by him as compensation for any service he rendered in the Post Office Department; but was sent to him and received by him, by reason of the provisions, of the contract which had been made between himself and the company, and under which, so far as this case has proceeded, he would be entitled to these monthly payments if he did or did not do anything under the contract.

Mr. Lehmann: We have the allegation of the indictment in double form. The allegation of the indictment is that the check was received by the defendant in the city of St. Louis, not stopping with that, it proceeds to state, in terms, that the money upon that check was paid to the defendant in the city of St. Louis. Now, we have enough indicated here plainly by the Government, that this was not the fact; that the check was mailed from the city of St. Louis to the city of Washington, was received by the defendant there, and the money received by him on account of the check in that city. Now, they cannot contravene the allegations of the indictment itself in that way. They have stated the fact that the check was paid here, and that the check was received here; both averments.

I submit that a check shown to have been received in the city of Washington, and shown to have been paid to the defendant there, not only does not support, but directly contradicts those allegations of the indictment.

Col. Dyer: That the question may be more definitely stated, I propose to read the stipulation which these gentlemen
138 have made in reference to this matter, so that the questions of law that are sought to be presented by this objection may be fully made and disposed of now. And to avoid any question between counsel and myself as to where this check was paid and where it was delivered, and where it was eventually paid, there can be no controversy between us, because the fact has been stipulated as to the truth of it.

Judge Krum: There is no controversy about it.

Col. Dyer: I desire to have this as part of the record? (reading from stipulation as follows) "It is further stipulated and agreed that the checks mentioned in counts 6, 7, 8, and 9, of Indictment 4192, were duly received by the defendant, in Washington, D. C. and by him endorsed and deposited with the Riggs National Bank, of Washington, D. C., and were afterwards duly paid by the Commonwealth Trust Company, at St. Louis, Missouri, and that said checks and all of the endorsements thereon, may be introduced and used in evidence in the trial of said cause."

That being true, I desire to call counsels' attention as well as that of the Court, to Section 731 of the Revised Statutes of the United States:

"When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein."

Now, this stipulation that I have read here shows that this check was written in St. Louis, sent to Washington, taken by the defendant at Washington, and deposited at the Riggs National Bank at Washington, and endorsed by him when
139 so deposited, and finally reached the Commonwealth company at St. Louis, and paid at St. Louis.

Upon the question of law that is raised by counsel as to whether or not the case must be tried in Washington, if there be a case, because this court would not have jurisdiction if the [offence] of receiving was committed wholly in the District of Columbia, and where the offense was committed, my associate

and assistant, who has with some care and labor examined the law upon this subject, and prepared a brief that he will now present to the court.

The Court: The last point made by counsel for the defendant, as to whether there was any evidence of defendant's receiving any sum of money for services rendered before the Department, necessarily involves a consideration of the evidence itself. Now, under the law this defendant is not guilty for making a contract to do anything. This defendant is guilty if he receives money, receives any compensation for services rendered before the department in a matter in which the United States is interested in any way. So, that, whatever be the true construction of the original contract entered into between the defendant in this case and the Rialto Grain and Securities company, the question is still open whether, as a matter of fact, he received money from the Rialto Grain and Securities company for services rendered before the department by him.

There has been so much comment on the evidence itself that it is proper for the court to say that the testimony of the witness who took the stand here first with respect to this matter leaves the matter as to what the services were to be in much doubt. There was no definite statement about it, in the memory of the court. He said that the accused was to receive $2500 as counsel; he said his services were to be as chief counsel. But he tells
140 counsel in the examination that a part of his duty was to see that the literature which should be sent out by the Rialto Grain and Securities Company should not violate the laws of the Post Office Department. Moreover, when the contract is finally executed in the shape of a letter written by Harlan in accordance with the interview which he had with the officers of the Rialto Grain & Securities Company on the 18th there is no limitation as to what his services should be. He is there said to be the counsel. He is to receive the $2500 in monthly allowances for services as counsel.

Taking these features of the evidence into consideration, it is certainly true that it cannot now be said that he was to perform no service under this contract for the Rialto Grain & Securities Company before the department. It certainly cannot be said that the contract did not require him to make it. On the contrary, there is evidence to be left to the jury not only of importance in itself, but of reasonable inferences that may be drawn from it, from which the jury may even be able to find that the contract contemplated this. And certainly it would not do for the court, in passing upon the admissibility of the evidence, to say that that would not be a fair and rea-

sonable inference; neither do I intend to intimate that it would be, but simply that it is a matter for the jury to pass upon what the original contract was between the parties: whether it contemplated in terms actual work in the post office department; or whether, by reason of the fact which was said by one of the witnesses to have occurred, that he did not undertake to perform any service in the Post Office department, the contract was made not to cover services before the department, but with the actual intention of rendering them. All this must be left to the jury.

141 But as I intimated at the start, the gist of this action, as counsel have well said, is the receipt of money for services rendered. It is entirely immaterial whether those services were rendered in [prusuance] of the terms of the contract or not. A contract, if one is proved in this case, will be evidence as to what the services were; but it is not conclusive evidence as to what the services were, and cannot be. The gist of the action is the receiving of money or compensation for services rendered.

Now, is there any evidence that he did receive any? Take up this matter as argued by counsel. Is there any evidence that he received money. He took a check. Now, for the purposes of argument, is there any evidence of the receipt of money in consideration of services? Two suggestions are made with reference to this. One was that the fact of his going to the Post Office department and making inquiries and getting information as specified and mentioned in the letter of November 20th, written by Burton to Harlan, were not to be dignified as services, were not to be treated or regarded as services to the value of $500. Well, why not? It depends upon what the services were and it depends upon what the parties paid for the services. I have seen, as counsel have seen many a time in the course of their experience at this bar and others, where some distinguished counsel takes his place at the counsel table and sits probably for the purpose of his influence upon the Court or jury in a matter of the determination of a question. And has not he performed services? Isn't it a service if a Senator of the United States, occupying that dignified and honorable and powerful position, goes before an executive department of the Government and there makes representations in favor of a given concern—is not that a service? He need

142 not labor with his hands; he need not write long discourses. But is it not a service for a man, situated as he is, to show that he is in favor of a given project, even though he does not act to forward that project? It would not do for the Court to say, upon the introduction of evidence at this stage of the case, that there is no evidence here of any service rendered by this defendant before the Post Office department of

any substantial character. The question is: What kind of service was rendered by him? Was it service by reading, or manual service, or service of his influence?

The next point made is that there is no service here rendered of any kind. I think the letter of the 20th written by the defendant to Mr. Harlan rather denies the assertion of counsel. That, certainly, without making any comment upon it whatsoever, is some evidence of his rendering service before the department.

Therefore, concerning these two features of the question which are presented by counsel, I do not have any hesitation in saying that there is some evidence of a service being rendered before the department in a matter pending before that department.

The next and most important feature of the objection is that arising on the actual production here of the checks which represent the money that was received by the accused at different times. The checks that have been offered in evidence bear date, one of them, I believe, the 22nd of November. That and that alone, I will refer to, because the others will be governed by the same considerations.

First, there is a criticism upon the indictment itself by counsel for the accused to the effect that the charge in the indictment is that the accused, on the 22nd day of November,
143 1902, received at the city of St. Louis, a check for the payment of money in the sum of $500, which said check —the indictment proceeds to allege,—bore date of November 22nd, 1902, and was made and drawn by the Rialto Grain & Securities Company, by Hugh C. Dennis, Treasurer, President, upon the Commonwealth Trust Company, of St. Louis, payable to the order of Joseph Ralph Burton, by the name of J. R. Burton, and by the said Burton duly endorsed and then and the
there by said Commonwealth Trust Company paid in lawful money of the United States to the said Joseph Ralph Burton —then and there paid to Joseph Ralph Burton, in the language of the indictment, that is the amount of this check was, by the Commonwealth Trust Company of St. Louis then, to-wit: on the date of November 22nd, and there, to-wit: in the city of St. Louis, paid by the Commonwealth Trust Company to said Burton. That is the last clause.

Now, the criticism is that because it is alleged in the first part of this indictment that this check was delivered to him in the City of St. Louis, that it is not supported by the proof, because it was not delivered to him under the claim of counsel, inasmuch as it was sent by mail to him and delivered to him and brought to his attention first in the city of Washington.

Suppose that is so. Suppose the letter itself which contained the check, carried the check to the accused and it was brought to his attention first in the city of Washington. The balance of the indictment is the gist of the offense, contains the gist of the offense. That is to say, that on the 22nd day of November the Commonwealth Trust Company paid over to Burton the sum of $500 as proceeds of the check drawn by the Rialto Grain and Securities Company for services rendered by the defendant. So that it does not impress the Court that the bare fact that
144 the pleader set forth that the check was delivered in St. Louis vitiates the indictment, or in any manner negatives the latter averments of the indictment; therefore the case will be determined by the proof and by the legal effect of the check itself, and that, too, with special reference to whether the proceeds of that was paid to Burton in the City of St. Louis or whether it was paid to him in the city of Washington.

It is of course well known if the receipt of the money occurred in the city of St. Louis, it is within the jurisdiction of this court; if the receipt of the money occurred in the city of Washington, it is not within the jurisdiction of this court. Therefore it is a very material point in this case.

The evidence shows, taking the checks themselves and the usual course and conduct of banking operations, of which this Court, without testimony, may properly enough take judicial cognizance, that this check was drawn upon a bank in the City of St. Louis, payable to the order of a person at Washington, and sent to the person at Washington and by him properly endorsed and deposited to his credit in a bank at the City of Washington, subject to his draft or check, and forwarded by that bank in Washington through one or more agencies to St. Louis, and paid.

In addition to that it is in evidence, and which, as I say the Court may and I think could properly enough take judicial cognizance, that the common [coustom] of transacting business by the banking institutions is, that when a check is deposited, as a matter of convenience the proceeds go to the credit of the depositor for the amount of the check, subject, however, to the right—not the legal right only, which you suggest, Mr.
145 Lehmann,—of a recourse upon the depositor of a check in the event of non-payment on account of his legal liability to restore that by virtue of a contract. But for the convenient transaction of business, recognized by universal custom, so far as it seems to me, a person gets the credit, subject, in the event of that check not proving good, to have it charged back. That, I think, is the usual course of business. You have got not only the evidence of a witness who says that the check was accepted according to the usual custom, but you have the evidence of the banker in Washington, who says that is not

only the course of business with them, but is the usual custom of banks in Washington.

Under such circumstances, the question, in my opinion, should be left to the jury whether or not when this check came to Washington and was presented by Burton to the bank and taken by the bank on deposit and subject to his draft, whether, or not the intent and purpose and the understanding of the parties, taking into consideration all the evidence in the case, and the well recognized customs and usages, was to the effect that the transaction was a purchase of the check by the bank, or whether it was an undertaking by the bank to collect the check for the benefit of the depositor, as his agent.

That, I think, is a question of fact to be submitted to the jury; that I think is a settled law, as is determined by the case to which my attention was called, that of the Frisco Company against Johnson, 133 U. S.

A great many cases go much further than that case, and hold that the true interpretation of the law is to declare it, as a matter of law, a matter of agency, and not a matter of purchase. While the Supreme Court intimates very strongly that this is the case, they have left this matter to be determined
146 mainly as a question of fact.

The objection is overruled.

To which ruling of the Court the defendant, by his counsel, then and there duly excepted.

Judge Krum: There was one check offered, the objection to which has already been stated. These other checks which are offered are open to an objection of a different nature altogether.

Col. Dyer: To keep my record, I will offer this check upon which your honor has ruled.

The check referred to by counsel was read in evidence, and is in words and figures as follows, to wit:

Rialto Grain & Securities Co.
(Incorporated) No. 624.
Secretary's Check issued
General Offices Rialto Bldg. Nov. 29, 1902.
St. Louis Commonwealth Trust Company
$500 St. Louis, Mo., Nov. 22, 1902.

Pay to the
order of J. R. Burton $500.00/100
Five hundred.....Dollars.
To the Commonwealth Trust Co Rialto Grain & Securities Co.
St. Louis, Mo. By Hugh C. Dennis, President.

Indorsed on the back:
J. R. Burton
Pay Commercial Nat'l Bank, Chicago,
or order,
The Riggs National Bank
of Washington, D. C.
Arthur T. Brice, Cashier.
Pay Franklin Bank
St. Louis, Mo. or Order,
Commercial National Bank
of Chicago
Jos. T. Talbert, Cashier
147 L. Kraemer, A. Cashr.
(Perforated) Paid.

The Court: Take up these other checks in order, and if there are any special objections I will listen to them.

Col. Dyer: I offer this as the next in order.

Judge Krum: This check, if the Court please, is dated on the 15th of December, 1902. We object to the introduction of this check on the grounds already indicated with reference to the checks in general; and the further ground that there is no evidence at all on any theory of any service rendered by Senator Burton in the Post Office Department, to which the receipt of this check as compensation could be made applicable. The District Attorney concedes that this is intended to be applicable to Count No. 7. Upon the theory of the Government and under your Honor's view, evidence has been adduced tending to show the service and compensation received, not on account, but compensation received for the service, that compensation being the check already in evidence of the 22nd of November.

Now, here you have a separate count, alleging another service and a separate payment alleged to have been received as compensation for that service rendered, independently altogether of the service covered by count No. 6. Now there is not a particle of evidence of any service rendered by Senator Burton in the department between the occasion of his going to the department and making the inquiry which is shown by the letter, and the receipt by him of this check now offered in evidence.* * Here is a series of counts, each one of them necessarily by its terms based upon the services rendered.

Judge Krum: My point is that the $2500 has nothing
148 to do with the arrangement between the Rialto Grain [&nd] Securities Company and Senator Burton, for the present. * * The charge is that he rendered this service and was paid for it and received the compensation therefor,

making a complete case under the statute. Now they undertake to proceed further than that, without any evidence at all as to any service rendered, and to show a second receipt of compensation, and I respectfully submit that it is not competent in the absence of any testimony whatever.

The Court: I cannot undertake to hold the United States District Attorney to prove both of these facts which are requisite to constitute an offense, at one time. Here, the gist of the offense, as has been well said, is the receipt of some compensation. Now the receipt of compensation from the Rialto Grain and Securities Company is one act, constituting the offense charged in one count of the indictment. And the receipt of other compensation may be the subject of another charge, and it may be supported by proof and it may not, but one of the elements of every one of these counts is the receipt of the money. The question is, so far as I now understand it, whether I will insist that the District Attorney shall prove his case by putting in one count first, and then—

Judge Krum: I respectfully submit that there should be some indication from the United States attorney that he at least proposes to adduce evidence as to something done by Senator Burton in the—as charged in the indictment—in behalf of the Rialto Grain and Securities Company between the occasion of the receipt of compensation, by him in November, and the receipt of compensation, on the theory of the Government, in December. That is my position. Of course I
149 am not going to contend here that the Government should be required to prove its case in a particular way, putting in this one now, and that one hereafter—

The Court: You may be sure that in the end the Court will tell the jury that there must not only be the receipt of money, but that it must be received as compensation for services rendered, and that is all that will be stated to the jury, and the jury wil find from the facts in the case.

You may introduce your evidence.

To which ruling of the Court the defendant, by his counsel, then and there duly excepted.

The check dated Washington, D. C., December 15th, 1902, payable to the order of J. R. Burton, for the sum of $500 was read in evidence and is in words and figures as follows, to-wit:

$500.00 Washington, D. C. Dec. 15th, 1902.
....On demand..... Pay to the
Order of J. R. Burton .....
Five hundred .....Dollars
E. T.
Dec. 17 1902.

Value received and charge the same to account of
To the Commonwealth Trust Co.
The Rialto Grain & Securities Co.
St. Louis, Mo. By Hugh C. Dennis,
President.

(endorsed on the back)
J. R. Burton
Pay Commercial National Bank, Chicago
or Order,
The Riggs National Bank
Of Washington, D. C.
Arthur T. Brice, Cashier.
150 Pay Mercantile Trust Co.,
St. Louis, Mo., or Order,
Commercial National Bank
of Chicago,
Jos. T. Talbert, Cashier.
Pay the Nat'l Bank of Commerce
In St. Louis, or order,
Dec. 20, 1902
Mercantile Trust Company
Geo. W. Wilson, Treasr.
St. Louis Clearing House
26
The National Bank of Commerce in
St. Louis
Dec. 22, 1902.
(Perforated) Paid.

Arthur T. Brice, a witness of lawful age, produced, sworn and examined on the part of the United States, testified as follows:

Direct Examination

By Col. Dyer:

Q. State your name, if you please? A. Arthur T. Brice.

Q. And your residence? A. Washington City.

Q. And your occupation? A. Cashier of the Riggs National Bank

Q. How long have you been cashier of the Riggs National Bank? A. Since its organization in 1896.

Q. I show you a check of the Rialto Grain and Securities Company, of date November 22, 1902, payable to J. R. Burton

for $500: I will ask you to state to the jury whether you are acquainted with Senator J. R. Burton? A. I know him, yes.

Q. Had he an account at your bank? A. At what time?

Q. Say on the 22nd of November, 1902? A. Yes,
151 sir, he had.

Q. And did he continue to have an account there until March, 1903? A. He did.

Q. I will ask you to look at that check and state whether that check was deposited at your bank, and when? A. This check was deposited in the Riggs National Bank to the Credit of Senator Burton. It has marked on the face of it.

"E. T."

which indicates it was passed to the credit of Senator Burton over the counter of the exchange Teller.

Q. Have you examined the account of Senator Burton at your bank so as to enable you to say it was passed to his credit at that time? A. I have.

Q. Was it so passed to his credit? A. It was.

Q. After it was deposited, what was the course taken by the bank in collecting that check?

Judge Krum: We submit, [it] the court please, that is not a proper inquiry, what was done with the check.

The Court: Q. What was done with the check, and what is your usual course of treating such checks as that, if you have a usual course in your bank? A. The usual course of the bank in receiving a check, or an amount of any kind from a depositor whose standing and credit is known, is to pass it to his credit without any question; send it direct to the place on which it was drawn, or else some near by agency for collection for the bank. If the check is not paid—

Mr. Lehmann: That is objected to I sumbit that the law governs in this matter, the check having been endorsed.

The Court: I do not know what he is going to say.
152 Mr. Lehmann: I simply want to know the fact.

The Court: Do you know what he is going to say?

Mr. Lehmann: I make no objection to the fact of what was done but my objection—perhaps I anticipated too soon—was to what I understood the witness was about to state as to a usage they held as governing the rights of the parties. I certainly did not intend to object to his statement of the fact.

The Court: Q. Go on, and state the course of dealing with that check, and others of that kind? A. The usual custom of the bank, as I stated, is to deposit the check to the credit of the depositor, send it forward direct either to the place where it is drawn, for collection, or else to some convenient collection agency near the place where the check is drawn. If the check

is not paid it is returned to the bank in the usual course, going to the bank where it is first sent, and then it takes one of two courses: that check is held in the bank teller's possession until the depositor calls and takes it up, or else charged against his account as if it were a check drawn against his account, and is surrendered to him on settlement of his account, together with other checks or vouchers which he may have drawn, the depositor being duly notified of such non-payment.

Col Dyer: Q. Was there with the Riggs National Bank any agreement made with Senator Burton contrary to the course you have just indicated as occurring? A. I know of no such special agreement.

Q. At the time that that check was deposited with you, or up to the time it was returned to you as being paid, or paid here and you got the returns for it, I will get you to state whether the bank account of Senator Burton was overdrawn at
153 that time?

Objected to by counsel for defendant as not competent or material.

The Court: You may answer the question.

To which ruling of the court defendant, by his counsel then and there duly excepted.

A. This is the check of Nov. 22, 1902; my recollection tells me that his account was not on that day overdrawn.

Col. Dyer: Q. Now I show you—so as to get the whole thing in at once,—draft of December 15, 1902, drawn by the same company, payable to J. R. Burton. I show you one drawn on January 22, 1903: I show you four checks which bear the endorsement of Senator Burton: Were they sent for collection in the same way that the first one you have mentioned was sent?

A. Three of these checks were sent, in the manner I have indicated, to the Commercial National Bank of Chicago, one of them was sent direct to St. Louis. That is the only variation in the method of collection of these four checks. They were sent our correspondent in Chicago by Chicago forwarded to St. Louis. And the other was sent direct to St. Louis.

Q. The fourth one, what do you mean by that? A. The check dated January 22, 1903, and passed to the credit of Senator Burton, January 22, 1903, was, contrary to the custom in the other cases, sent direct to the National Bank of Commerce of St. Louis for the credit of the Riggs National Bank.

Q. Was there any agreement between the Riggs National Bank and Senator Burton in reference to these checks contrary to the usual course of proceeding you adopted in this case and in the other case.

Objected to by counsel for defendant upon the ground that the agreement between the bank and Senator Burton is evidenced by the checks, agreement in writing and the endorsements thereon; they are written agreements and cannot be varied by parol.

154

The Court: You may answer.

To which ruling by the Court, defendant, by his counsel then and there duly excepted.

A. Not to my knowledge. To my knowledge we had no special agreement with Senator Burton. It is the general understanding and practice of the bank.

Cross-Examination

By Judge Krum.

Q. When you say that the check was passed to the credit of Senator Burton, or that checks were passed to his credit; what you mean is that upon the deposit of a check endorsed by him it was passed to his credit and he was at liberty to check against the whole amount standing to his credit, including the amount evidenced by the check itself, isn't it? A. Yes sir.

Q. So that the check went in to swell the amount of Senator Burton's account on the date of its deposit, that was the fact, wasn't it? A. Yes sir.

Q. If, for instance, he had a balance there to his credit of $1,000 and deposited a check for $500, and that was passed to his credit, that gave him a balance of $1500 to check against? A. Yes, he might draw the whole of it without waiting to hear from the check.

The Court: Q. You have been a long time in the banking business, Mr. Brice? A. A good many years; I have been in the bank since 1882.

Q. Are you prepared to state whether or not the practice you have referred to as governing your bank was a general practice among the banks with respect to such matters as this, where a check is received and placed to the credit of an individual depositor, and when it is afterwards dishonored by the bank on which it is drawn, that the usual course of such procedure is to notify the party to come and take it up, or charge it to his account? A. That is my understanding.

Q. That has been the common understanding among bankers and the common practice among the banks? A. I have never known that custom to be controverted up to the present time.

Q. It never has been controverted? A. Not to my knowledge.

Adjourned to March 24, 1904 at 10 a. m.

155 March 24, 1904.

Court reconvened, pursuant to the foregoing adjournment, at 10 o'clock a. m.

Col. Dyer: I offer in evidence check dated January 22, 1903.

Judge Krum: We object to the introduction of the check of January 22 because it is applicable to count 8. It is not competent because there is no evidence of anything having been done by the defendant between the receipt of the check of the 15th of December and the obtaining of the proceeds of that check, and the date of the check itself now offered in evidence. This objection, of course, is substantially the same as that made to the check dated 15th of December.

Objection overruled; to which ruling of the Court, defendant, by his counsel, then and there duly excepted.

The Court: There is a stipulation between counsel with respect to these facts, I believe. That is in evidence, is it not?

Col. Dyer: It is filed as a stipulation in the case.

Judge Krum: The stipulation covers the endorsement on the check, and that was all.

The Court: I don't know that the stipulation was offered. It was not read. You offered it, and did not read it, is that correct?

Col. Dyer: No sir, I read it. I will read it again.

The Court: It is not necessary to read it, I simply want to know that it is in evidence.

Judge Krum: The stipulation obviates all proof with reference to the making of the check or its endorsement, or its being paid. There is no controversy about that at all.

Col. Dyer: I have asked the stenographer if it is incorporated in the notes, and he says not.

156 The Court: Suppose you offer it in evidence without reading it.

Col. Dyer: I offer the eighth clause of the stipulation.

The Court: Is the whole stipulation offered?

Col. Dyer: The whole stipulation is offered in evidence. The stipulation referred to was admitted in evidence and is in words and figures as follows, to wit:

157 United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

United States
No. 4992. vs.
Joseph Ralph Burton

It is stipulated and agreed by the defendant and plaintiff, as follows:

1st: The Defendant, Joseph Ralph Burton, was at all of the times mentioned in indictment No. 4992, and is now a member of the Congress of the United States of America, to-wit: a Senator from the State of Kansas, duly elected and chosen, by the legislature of the State of Kansas, for a term of six years, expiring on the 4th day of March, A. D. 1907, and was at all of said times duly qualified, admitted and acting as such Senator.

2nd: It is stipulaeed and agreed that an uncertified printed copy of the Postal Laws and Regulations of the United States of America (Edition of 1902, in effect April 1, 1902) as promulgated by the Post Office Department of the United States, may be introduced and used in evidence in said cause.

3rd: It is admitted that the originals of the telegrams to and from Joseph R. Burton (hereinafter mentioned) have been by the Telegraph Companies over whose lines they were sent, destroyed, and that copies thereof now in the hands of the United States Attorney, may be introduced and read in evidence in the above entitled cause with like force and effect as the originals if produced.

The telegrams above referred to are as follows:
Burton to Dennis, dated December 13, 1902;
Burton to Dennis, dated December 17, 1902;
Burton to Dennis, dated December 22, 1902;
Dennis to Burton, dated December 22, 1902;
Burton to Harlan, dated January 6, 1903;
Burton to Dennis, dated January 24, 1903;
Burton to Harlan, dated February 11, 1903;
Mahaney to Burton, dated February 11, 1903;
158 Mahaney to Burton, dated February 14, 1903;
Burton to Mahaney, dated February 17, 1903;
Mahaney to Burton, dated February 17, 1903;
Mahaney to Burton, dated February 25, 1903;
Burton to Mahaney, dated February 27, 1903.

4th. Notice to produce, and the introduction of original letters from Harlan to Burton is hereby waived, and copies thereof, may be introduced and used in evidence, in the trial of the above entitled cause with like effect as if the original letters themselves had been introduced.

The letters above referred to are dated November 18, 1902, November 19th, 1902, November 22, 1902, December 2, 1902, December 3, 1902, December 15th, 1902, and January 27th, 1903.

5th. It is stipulated and agreed that the government may introduce and read in evidence a copy of a letter from Dennis to Burton, dated January 22, 1903, now in the possession of

the United States Attorney, with the same effect as if the original were offered and introduced.

6th. It is further stipulated and agreed that letters from the defendant, Burton to Thomas B. Harlan, dated November 20, 1902, December 9, 1902, January 19th, 1903 and February 11, 1903, now in the possession of the United States Attorney were either signed by the defendant or by his, defendant's direction.

7th. It is further stipulated and agreed that all of the letters and telegrams above referred to, purporting to have been signed by the defendant, were signed and forwarded by him, or by his direction.

8th. It is further stipulated and agreed that the checks mentioned in counts 4, 5, 6, 7, 8 and 9 of the indictment No. 4992 were duly received by the defendant in Washington, D. C. and by him indorsed and deposited with the Riggs National Bank of Washington, D. C., and were afterwards duly paid by the Commonwealth Trust Company, at St. Louis, Missouri, and that said checks and all of the endorsements thereon may be introduced and used in evidence in the trial of said cause.

159 All of the above specified papers may be introduced and used in evidence in the trial of said case, subject only to the defendant's objections to the same, or any part thereof, as to their competency, relevancy and materiality.

(Signed) CHESTER H. KRUM,
for Defendant.
DAVID P. DYER,
United States Attorney.

Counsel for the Government read check No. 1698 for $500, to J. R. Burton, signed Rialto Grain and Securities Company, by H. C. Dennis, President, the same being in words and figures as follows, to-wit:

Rialto Grain & Securities Co.
(Incorporated) No. 1698
General Offices: Rialto Bldg.
St. Louis,.
$500 St. Louis, Mo., Jan. 22, 1903.
Pay to the
order of J. R. Burton $500
Five Hundred ..... Dollars
R. T.
Jan. 27, 1903.
Commonwealth Trust Company,
St. Louis, Mo.
Countersigned: Rialto Grain & Securities Co.
W. D. Mahaney By Hugh C. Dennis,
V. Prest. Treasr Comptroller President.
(endorsed on back)
J. R. Burton.
Pay B. F. Edwards,
Cashier or order,
The Riggs National Bank
of Washington, D. C.
Arthur T. Brice, Cashier,
26
St. Louis Clearing House
The Nat'l Bank of Commerce in St. Louis.
(perforated) paid.

160 Col. Dyer: I will next offer in evidence check dated February 16, 1903.

Judge Krum: We object to that check on the ground as indicated, that there is no evidence of any service rendered or any act done by the defendant in behalf of the Rialto Grain and Securities Company in the Post Office Department, as alleged in that indictment, or anything of that character or description, between the occasion of the receipt of the check of the 22nd of January and the receipt of the check which is now offered.

Objection overruled; to which ruling of the Court the defendant, by his counsel, then and there excepted.

Counsel for the Government here read the check dated February 16, 1903, payable to J. R. Burton, signed by the Rialto Grain and Securities Company, which is in words and figures as follows, to-wit:

Rialto Grain & Securities Co.
(Incorporated) No. 2083
General Offices: Rialto Bldg.,
St. Louis.
$500 St. Louis, Mo., Feby. 16, 1903.
Pay to the
order of J. R. Burton $500.00
Five Hundred ..... Dollars
Commonwealth Trust Company,
St. Louis, Mo.
Rialto Grain & Securities Co.
Countersigned: A. D. Hardie, By W. D. Mahaney,
Secy. V. P.
161 (endorsed on back)
J. R. Burton
Pay Commercial National Bank, Chicago,
or Order
The Riggs National Bank,
of Washington, D. C.
Arthur T. Brice, Cashier.
Pay Franklin Bank
St. Louis. Mo., or Order,
Commercial National Bank
of Chicago,
Jos. T. Talbert, Cashier.
11
St. Louis Clearing House
March 3, 1903.
Franklin Bank.
(perforated) Paid.

Joseph P. Carr, a witness of lawful age, produced, sworn and examined on the part of the United States, testified as follows:

Direct Examination

By Col. D. P. Dyer:

Q. Your name is Joseph P. Carr? A. Yes sir.

Q. And you live in St. Louis, Missouri? A. Yes sir.

Q. On the 26th of March, 1903, what was your business? A. I was engaged as clerk by the Rialto Grain and Securities Company.

Q. Where is their office? A. In the Rialto Building.

Q. In this city? A. Yes sir.

Q. How long were you connected with the Rialto Grain and Securities Company, as clerk? A. From the 11th of November, 1902, until the 20th of September, 1903.

Q. Do you know the defendant, Senator Burton? A. By sight.

Q. Do you know, was Senator Burton at the offices of the Rialto Grain and Securities Company in the Rialto Building in this city?

Judge Krum: If the court please, while the defendant contends that evidence as to the payment to him and the receipt by him of $500, as alleged in the first and second counts of this indictment; as to the 26th of March, 1903, it is not com-
162 petent, for the reason that I have indicated to your honor, he admits, so there will be no occasion to occupy time with testimony on the subject, that the sum of $500 was paid to him in the city of St. Louis on the 20th of March, 1903 by the Rialto Grain and Securities Company under the contract which has been testified to by Mr. Kastor.

Col. Dyer: That admission is very good as far as it goes. The last limitation upon that paper, I shall have something to say about the evidence upon that, as to what the services were, when I get to it.

Judge Krum: I want to save the time of the Court.

The Court: I shall be glad to have that done, but the admission is not acceptable to the United States District Attorney, in the form it was made.

Judge Krum: Then I withdraw the offer.

Q. (Last question read): A. I saw Senator Burton on two occasions that I remember in the offices of the Rialto Grain and Securities Company.

Col. Dyer: Q. On what two occasions were they, Mr. Carr? A. The first time—I don't remember the day, Colonel, but it was prior to this March 26th. I had gone into Mr. Gould's office, who was then auditor of the Rialto Grain and Securities Company, to give him some papers, or on some business connected with him, and just as I was leaving the office—I might say, Mr. Gould is a loud talker, you can hear him talk very plainly—and just as I was leaving the office Senator Burton entered—as I went out he entered—and I heard Mr. Gould say "Hello, Senator". I went on back to my desk and after the Senator left I saw Mr. Gould—

Col. Dyer: You need not state what Mr. Gould said after the Senator left. How long was that prior to the 26th of March? A. I cannot recollect.

Q. On the 26th of March, did you see him in the Rialto Grain and Securities Company's offices then? A. Yes sir.

Q. In company with whom? A. He was sitting in
163 Mr. Mahaney's office, who was then vice-president and in management of the company, Major Dennis being away and he was sitting in the president's office.

Q. During the time that he was there, did you write the check I show you now (handing paper to witness), on the Mechanics National Bank of St. Louis?

Judge Krum: I submit it is wholly immaterial whether he wrote the check.

The Court: It is immaterial in itself, and is not competent, but this is a detail which may be admitted.

To which ruling by the Court the defendant, by his counsel, then and there duly excepted.

A. I wrote that check, but I cannot say whether Senator Burton was in the office when I wrote the check, because my office was in a different part of the building.

Judge Krum: Senator Burton never had this check, your Honor.

Col. Dyer: There is no pretense of that.

Q. I will get you to state when you wrote that check at the time you wrote the check, did you also write what is on the stub of the check? A. I did.

Q. And it was written on the 26th of March, 1903? A. Yes sir.

Q. After it was thus written, what did you do with the check?

Objected to on the part of the defendant, as not competent.

Judge Krum: What difference does it make, by what process a mere representative of the Rialto Grain and Securities Company became possessed of $500. I have endeavored to help my friend out, by admitting all that is necessary to be shown in reference to what was done in regard to that last payment.

The Court: And have withdrawn the admission. He may answer the question.

164 Col. Dyer: Q. What did you do with the check, that is the question?

A. May I state how I happened to draw the check?

The Court: Answer the question.

A. The check was drawn and I was told to get the currency.

Judge Krum: I object to what was told him.

The Court: Q. Who told you? A. Told me what?

Col. Dyer: Q. You stated you were told to get the currency, who told you that? A. Mr. Mahaney.

Objected to on behalf of the defendant.

The Court: The question is simply whether it came from this Rialto Grain and Securities Company. These are steps which are being proved in evidence. I cannot eliminate one.

A. I was told to get the currency on the check, and in that way got the cash, and my recollection is, to get it [—] large bills. I sent Samuel Withal, a clerk in the office, a little boy who had authority to get money from the bank, and my recollection is he went down there and got five $100 bills and brought them back and handed them to me, and I in turn took that money to Mr. Mahaney's office, and handed the money to Mr. Mahaney.

Q. Who was present when you handed the money to Mahaney? A. Senator Burton.

Q. Was that your connection with the matter? A. It ended entirely there. I left the office.

165 Cross-Examination

By Judge Krum:

Q. At the time of this occurrence, Major Denis was not here, was he? A. He was in California.

Q. How long had he been gone from St. Louis? A. He left the latter part of February, I do not recollect the date.

Q. You were connected with the Rialto Grain and Securities Company, yourself at that time? A. As a Clerk.

Q. In what condition was he when he left?

Col. Dyer: Does that grow out of my examination? I was not examining as to Dennis's condition. It does not grow out of any examination I made as to whether Dennis was well or sick.

Objection overruled.

A. I did not see the Major, Mr. Krum. He was living at the Planters House, but I had not seen him for some little time. He was sick, so I had been informed and I had not seen him.

Q. From the time you indicate, in February, down to this time in March, he had not returned to the city? A. No sir.

Q. What was his official relation to the Rialto Grain and Securities Company? A. Whom do you mean?

Q. Major Dennis? A. He was the President.

Redirect Examination

By Col. Dyer:

Q. Thomas B. Harlan was General Attorney for the company here? A. He was attorney for the Company, so I understood from the letter heads.

Col. Dyer: I offer the check upon which the money was drawn, so as to show it was the check of the Rialto Grain and Securities Company.

The Court: It is not necesssary to read it.

Col. Dyer: I offer the check and the stub of that check in evidence.

166 The check and stub of check referred to were admitted in evidence and are in words and figures as follows, to-wit:

(Copy of check)

The Mechanics' National Bank of St. Louis
St. Louis, March 26, 1903 No. 214

Pay to the
Order of Cash.....$500.00
Five Hundred .....Dollars
W. D. Mahaney, V. P.

(Stamped)
$500
Cash

A. D. Hardie
(Endorsed on back, in pencil) Sam. Withall.

(Copy of Stub)

No. 214
Date 3/26 1903
Order of
J. R. Burton $500
Salary
(Stamped)
Entered.
(In pencil) 1/5/03
2/16/03

W. D. Mahaney a witness of lawful age, produced, sworn and examined on the part of the United States, testifies as follows:

Direct Examination

By Col. D. P. Dyer:

Q. Will you please state your name to the Jury? A. W. D. Mahaney.

Q. On March 26th, 1903, were you connected with the Rialto Grain and Securities Company in any wise? A. Yes

167 sir.

Q. In what capacity? A. As vice-president.

Q. How long had you been connected with the Rialto Grain and Securities Company, Mr. Mahaney? A. Since September, 1902.

Q. Who composed the first board of directors of that company? A. Major Dennis, Mr. Harlan, Mr. Leftwich and myself. Possibly there was one more, I do not remember.

Q. Do you know Senator Burton? A. Yes sir.

Q. I will get you to state to the jury whether you saw him in the offices of the Rialto Grain and Securities Company in the city of St. Louis on the 26th of March, 1903? A. I did.

Q. Did you at that time pay to him any money for the Rialto Grain and Securities Company?

Judge Krum: We object to that question, if the Court please, as not competent, for the same reasons which have been indicated as applicable to the checks which have been objected to and admitted over the objection.

Objection overruled. To which ruling by the court defendant, by his counsel, then and there duly excepted.

A. Yes.

Q. How much? A. Five hundred dollars.

Q. Can you state the size of the bills, or the character of the money? A. No sir, I cannot.

Q. When had you, prior to the payment of that money on the 26th of March, 1903, met Senator Burton for the first time? A. In December, 1902, at Washington.

Q. In company with whom, if anyone, did you meet him at Washington? A. With Major Dennis and Mr. Wicks.

Q. Where did you meet him? A. In the New Willard Hotel at Washington.

Q. Do you recollect the date of that meeting? A. The 15th of December, 1902.

168 Q. I want to ask you whether or not there was any conversation had at Washington with Mr. Burton at that time, concerning the Rialto Grain and Securities Company, or Hugh C. Dennis, its president? A. Yes sir.

Q. Where did you meet Senator Burton in the Willard Hotel? A. I was introduced to him in the lobby of the hotel.

Q. State what occurred after your introduction? A. Senator Burton and Major Dennis went up in the elevator with Mr. Wicks, and about ten minutes later, Mr. Wicks came to the lobby of the hotel, where I had remained, and asked me to join them in Major Dennis' room, and I did so.

Q. State what occurred in the room and what was said in that room? A. Major Dennis produced a copy of the indictment which had been found against him by the Federal Grand Jury, for Senator Burton's inspection. It was read over and discussed—I cannot recall the exact language of course—and Senator Burton asked Major Dennis to tell him all he knew of the actual facts, that inasmuch as he was counsel, he must be put in complete possession of all information bearing upon the subject.

He also asked about the conduct of the Rialto Grain and Securities Company and the rules governing marginal trading. The discussion lasted perhaps an hour. I don't know just how long, and Senator Burton left, saying he would meet the major the next morning.

Q. Did you see them when they met the next morning? A. Yes sir.

Q. What was said by either Dennis or Burton when they met the next morning, as to what was to be done, if anything? A. Well, they talked for a few moments in the lobby of the hotel; I cannot say exactly what was said; and then Major Dennis excused himself to me and went away with Senator Burton.

Q. Was anything said in the presence of Senator Bur-
169 ton as to where they were going? A. Yes sir, that he was going to take him over to the department.

Q. What department? A. He did not state at the time.

Q. Did you afterwards learn from Senator Burton that he had gone with him to the Post Office Department? A. Not from Senator Burton.

Q. How long did you remain in Washington at that time? A. From Monday morning until noon of the following day.

Q. Did you and Major Dennis go to Washington together? A. Yes sir.

Q. Did you leave there in company with him, or where did you go?

Objected to as immaterial.

Q. You left there together? A. Yes sir.

Q. Did you return to Washington at any time after that? A. No sir.

Q. When, after that time of leaving Washington, did you next see Senator Burton? A. On the 24th of December 1902.

Q. Where did you see him then? A. In the office of the Rialto Grain and Securities Company, in this city.

Q. Who was present at that time? A. Judge Krum, Mr. Harlan, Senator Burton and myself.

Q. What was said, if anything, in that conversation, about the indictment against Dennis, or the affairs of the Rialto Grain and Securities Company? A. The indictment was discussed by those gentlemen in quite a lengthy interview and the affairs of the Rialto Grain and Securities Company were discussed to some extent. Finally—shall I continue?

Judge Krum: Go ahead.

Col. Dyer: Yes, state all that occurred.

A. Finally, they agred there was not much danger in the indictment and the result of the trial, and the question of Senator Burton's appearing here as counsel in this city was dis-
cussed and referred to him, and after some discussion
170 pro and con they decided it would be as well for him not to appear here.

Q. What was said in that conversation by Mr. Burton or anyone else, as to why he would not appear here? A. The reason given and discussed was, that it would probably be ill advised for him to appear here, on account of his official position, because it would perhaps antagonize the Post Office officials here. At that time the impression obtained, as expressed by Mr. Harlan, that Inspector Dice was very antagonistic to Major Dennis, and they construed the situation as being such that it would be better for the Senator not to appear, because it would show he was perhaps too much interested in the Post Office department feature of the case.

Q. What, if anything, was said in that conversation, about keeping the Post Office Department at Washington on good terms with the Rialto Grain and Securities Company?

Judge Krum: We object to this method of suggesting to the witness.

Col. Dyer: Q. What if anything was said? State all that was said. A. I cannot recall at that time that anything in that particular line was said.

Q. At any other time? Did you see Senator Burton after that meeting here in December, after your visit to Washington in the same month? A. Yes sir, I saw him later on.

Q. Where did you see him? A. At the office of the Rialto Grain and Securities Company.

Q. What time was that? A. March 26, 1903.

Q. Were those the only three times you saw him, to talk with him, once in Washington, and then here in December, and then in March? A. No, sir, I met him several times in the Rialto Building later on. I also saw him at the Planters House at that time.

Q. Did you at any time talk with him and discuss with him the affairs of the Rialto Grain and Securities Company
171 in reference to its relations to the Post Office department? A. On the occasion of his visit there on March 26, 1903, the attitude of the department toward the Rialto Grain and Securities Company was discussed at great length and I stated to him that, as far as I knew, there was nothing pending of a dangerous character, and he agreed in that.

Judge Krum: Q. I did not understand that? You stated there was nothing pending? A. That as far as my knowledge went there was nothing pending of a dangerous character at that time, against the Rialto Grain and Securities Company, and he agreed in that opinion.

The Court: Pending where? A. In the Post Office department at Washington.

Col. Dyer: Q. Was there anything said in that conversation about the complaints that had been referred to the Post Office inspectors here for examination? A. I do not think there was. I do not recall.

Q. What, if anything was said by Senator Burton to you about this payment of $500 being the final payment to him, or why it was ended there, if you know?

Judge Krum: If the court please, I object to that way of examining the witness.

Objection sustained.

Col. Dyer: Q. State all that was said there? A. On the occasion of his visit to the office on March 26th?

Q. Yes. A. I told him we were anxious to reduce our fixed charges. There had been very heavy drafts on the company in various ways, and inasmuch as he was not going to be in Washington and there was nothing that I knew of pending there which would occasion his services, I thought it would be, perhaps, as well to discontinue his services. He agreed in that, and I gave him the money.

Q. I will get you to state whether or not this Rialto Grain and Securities Company had any office or had an office
172 anywhere, other than the offices in the city of St. Louis, to your knowledge? A. Not to my knowledge.

Q. I will get you to state whether there was any business of that company at Washington to your knowledge other than the business with the Post Office Department?

Judge Krum: We object to that as not competent.

The Court: You may ask him if there was any business of the company at Washington, and if there was any he may state what it was?

Col. Dyer: Q. State what it was? A. None that I know of.

Q. Was there anything said in either of these conversations with Senator Burton about the character of the literature that was being sent out by the Rialto Grain and Securities Company? A. No sir.

Q. I will get you to state whether there was any conversation—I have got to call your attention to some of these facts by making suggestions—state what was said, if anything, with reference to the destruction of certain letters that had been written by Senator Burton? A. On the occasion of his visit on March 26th, after he had been paid this money, he said to me that if I had any correspondence from him it would be perhaps as well to destroy it, lest any misconstruction might be put upon it. That letters from a man in his position were frequently

misconstrued, and it would be as well to have them out of the way. I had two letters from him there in my desk at the time, and destroyed them in his presence.

Q. Did you show them to him? A. Yes sir, I showed them to him. I said "I have two of your letters here", and destroyed them in his presence.

Q. Those letters were destroyed in his presence, how were they destroyed? A. I tore them up and threw them in the waste basket.

173 Q. What reason, if any, other than you have stated, was given by Senator Burton for the destruction of those letters?

Judge Krum: I submit, if the court please, that is not proper.

The Court: I think that is right. What did he say about the destruction of the letters?

Col. Dyer: Q. What did he say? A. Nothing, except what I have told you, that letters from a man in his position —official position, might be misconstrued in the event of anything happening, if they came into the possession of people antagonistic, they might be misconstrued and it would be better to have them out of the way. And he asked me if I had any letter, and I said I had two, and I destroyed them right away.

Q. I will ask you whether or not, in that conversation, anything was said by him in that connection, about his connection, or former connection with, or the publication of letters of the National Securities Company?

Judge Krum: Objected to as not competent, even if the statement was made.

The Court: He may answer. It is calling attention to a particular subject after his saying he recollected some.

Judge Krum: The point of the objection is not to the form of the question, but to the subject of the inquiry. The National Securities Company is not involved here in any way. There is no inquiry open as to that company in this case.

The Court: What is that?

Judge Krum: The National Securities Company.

The Court: What is your purpose, Col. Dyer?

Col Dyer: I want to show the reason—I don't care anything about the National Securities Company—I am trying to get out of this witness all the statements made by Burton at that particular time as to why he wished his correspondence with the Rialto Grain and Securities Company destroyed, and

174 the reasons he gave, if any, for that destruction.

Judge Krum: The witness has stated the reason the Senator gave.

The Court: The question is whether there were any other reasons given, and he now calls attention to a particular line, with a view of calling out if any other reasons were given for destroying the letters. He may answer the question.

To which ruling by the court the defendant, by his counsel, then and there duly excepted.

A. He said his name had been connected in some newspaper articles with the National Securities Company, and it had created a great deal of unfavorable comment, and he did not want a recurrence of anything of that kind.

Col. Dyer: Q. Is that all that occurred that you recollect at that time? A. That is all I recall.

Q. Who was present at the time, if anyone, when you paid him these $500 in currency? A. There was no one present at the time.

Q. From whom did you get the $500 that you paid him? A. From Mr. Carr.

Q. Joe Carr, the last witness on the stand? A. Yes sir.

Q. You may state, if you will, at what time Mr. Dennis, the president of this company, left St. Louis in 1903? A. My recollection is that it was February 5. I am not positive, however.

Q. After he left here, you, as vice president, became the acting President of the company? A. Yes sir.

Q. Do you recollect a man by the name of McGowan, who made claim against the Rialto Grain and Securities Company? A. Yes sir.

Q. Was there, to your knowledge, any correspondence by any officer of the company, either yourself or Mr. Harlan, with Senator Burton, in reference to that claim of McGowan's? A. There was.

175 Q. I show you a message, dated the 11th of February, 1903, and ask you if you recall having sent that message? A. (After examining paper) Yes sir.

Col. Dyer: That is one of the telegrams covered by this stipulation. I will read it.

Judge Krum: It is objected to because it is not competent upon any theory open under this indictment. I understand it is offered with reference to what Mr. Mahaney has indicated as being a claim by one McGowan. Now, there is nothing averred in the indictment with reference to any action taken by Senator Burton in reference to that matter in behalf of the Rialto Grain and Securities Company, in the Post Office depart-

ment, or anywhere else. There is a specific service alleged to have been rendered by the defendant, and that is all.

The Court: What is that specific service alleged?

Judge Krum: It is the same in all the counts "That the services so as aforesaid rendered, consisted in part of visits to the said Post Master General, the Chief Post Office Inspector, and other officers of the Post Office department of the United States; and of representations and statements made to the said Post Master General, the said Chief Post Office Inspector and said other officers, which said visits, representations and statements, so as aforesaid made by the said Joseph Ralph Burton, were made with the view and for the purpose of inducing said Post Master General", to decide the question which the indictment alleges was pending in the department favorably to the Rialto Grain and Securities Company. If your Honor please, we have proceeded upon what we have ventured to consider the obvious hypothesis, that the defendant can be called upon to meet only what has been averred against him. And accordingly, when the indictment alleges what the service was—namely, visits to the Post Master General, The Chief Post Office Inspector, and representations and statements made to these officers,
176 that the evidence as to what the service was will be limited to the averments thus made.

The Court: It is true that up to now there has been evidence with respect to these several persons making complaint? That was admitted for the purpose of showing that there was something pending in the department, the purpose being to get at the fundamental thing in this case, which is, Did he render services connected with anything pending in the department? There is no charge in this indictment with respect to particular services rendered in connection with the complaints of A or B or C. The general charge is that he rendered services in the department in a matter in which the United States is interested; and his service in a general way is referred to, namely, appearance in the department and different offices in the department, and inducing their favorable consideration. Certainly there is no reason, based upon the general statement in the indictment, why you cannot inquire into anything the defendant did in the department, during the time involved in this litigation, that might affect the question of the Post Master General's action in regard to the Rialto Grain and Securities Company. The objection is overruled.

To which ruling by the Court the defendant, by his counsel, then and there duly excepted.

The Court: I cannot tell what the dispatch will show, but assume some connection will be shown.

Judge Krum: There is not a particle of connection.
Col. Dyer: We will show the connection.
The Court: Of course I cannot tell now.

Col. Dyer: Before asking him further questions, I offer to read a dispatch on the same date as this one, Feb. 11, 1903, from Senator Burton to Thomas B. Harlan.

Judge Krum: We object to this, if the court please, because the telegram shows on its face that if it resulted from any inquiry made by Senator Burton of anybody, it was entirely made by him in the Indian department. I respectfully
177 suggest that that was a little remote from the scene of operations sought to be covered by this indictment.

Objection overruled;
To which ruling by the court the defendant, by his counsel, then and there duly excepted.

Counsel for the Government here reads the telegram dated Washington, D. C. Feb. 11, 1903, addressed to Thomas B. Harlan, and signed J. R. Burton, which telegram is in words and figures as follows, to wit:

Western Union Telegraph Company

Received at 412 & 414 Pine Street, St. Louis, Mo.
Telephones: Main 246; Kinloch, B 520 Standard time
1677

30w h is 86 Paid Govt.
St Washington D C Feb. 11-03.

Thos. B. Harlan,
Care Rialto Grain & Securities Co., Rialto Bldg.,
St. Louis, Mo.

S. M. McGowan is Indian Agent at the place named but Dept had telegram from him yesterday which indicates that yesterday he was in the Territory Indian Commissioner will wire today to see if McGowan is in St. Louis and will make inquiry of him why he is taking such proceedings. Message though signed by him may have been signed by his clerk. Dept has great confidence in the real McGowan.

J. R. BURTON.

1253 pm

Col. Dyer: Q. Did you see that message when it was received here? A. Yes sir.
Q. Now, when that message was received, you sent this wire to him of the same date, to Senator Burton, didn't you? A. (After examining paper) Yes sir.

Judge Krum: Now, we submit that what has been developed shows that this telegram from Mahaney to Burton was absolutely irrelevant to any issue in this case.

Objection overruled; to which ruling by the court the defendant, by his counsel, then and there duly excepted.

178 Counsel for the Government here read the telegram addressed to J. R. Burton, Washington, D. C., dated February 11, 1903, signed W. D. Mahaney, which telegram is in words and figures as follows, towit:

2/11/3

Hon. J. R. Burton,
Washington, D. C.
Discontinue investigation. Matter settled amicably.
Paid. Rush. W. D. Mahaney.

Col. Dyer: Q. Now, I will get you to state whether at the time these messages were being sent and received, McGowan had threatened the Rialto Grain and Securities Company, by having inspectors examine it?

Counsel for defendant objected to the question.

The Court: The question is objectionable in form; whatever he did may be shown as to complaints.

Col. Dyer: Q. How long was that controversy between McGowan and the Rialto Grain and Securities Company, and the message I have last read?

Judge Krum: That question assumes there was a controversy.

Col. Dyer: Q. Was there a controversy? A. There was.

Judge Krum: I submit that is a mere assumption. He has not offered any testimony on that subject.

The Court: Answer the question.

A. There was a controversy over a sum of money.

Judge Krum: Q. Was that in writing? A. No sir, it was verbal.

Col. Dyer: Q. Go on? A. As to whether there was anything due him or not, and if there was, how much?

Q. Did you know, at the time of this controversy, that McGowan was an Indian agent?

Objection on behalf of defendant.

A. I did not.

Q. Did the letters that you alluded to awhile ago as
179 having been destroyed by you, have anything to do with or anything to say about the McGowan matter?

Judge Krum: That is objected to as not competent.

The Court: The objection is overruled. The evidence so far tends to show it was done by the instigation of the accused, and you can state what they contained, if you know.

Col. Dyer: Q. Give the substance of the letters? A. My recollection is that one was confirmatory of the telegram you read as to McGowan being in good standing with the department.

Q. Can you recall the contents of the letter any further of of the letters that were destroyed, as you say, at the instance of Burton? A. There was another letter in answer to a telegram which I had sent him at one time, or in answer to a letter which I had written him, saying I had been advised there had been a couple of inspectors appointed—

Judge Krum: This is objected to.

Col. Dyer: Q. Before going into that any further, I will show you a telegram, dated Feb. 25, 1903, and ask you to look at that and state whether you recollect of having sent that message? A. (after examining paper) I did send this.

Col. Dyer: I will offer in evidence and read that message.

Judge Krum: That is objected to as not competent, because it is not in any direction as indicated by the indictment.

The Court: Inasmuch as the indictment does not indicate any details, but the general statement, any of this testimony which tends to show services were rendered before the department is competent.

Judge Krum: I beg your pardon, but is it your honor's view of the indictment, that it does not allege any particular services?

The Court: It generally states what it was, but not the particular complaint of A or B; simply that services were rendered before the department, and that services were ren-
180 dered in connection with that matter generally.

Judge Krum: This telegram shows on its face that it has no relation to any matter pending in the department.

Objection overruled; to which ruling by the court the defendant, by his counsel, then and there duly excepted.

Counsel for the Government here read the telegram dated Feb. 25, 1903, addressed to J. R. Burton and signed W. D. Mahaney, which is in words and figures as follows, towit:

2/25/3

Hon. J. R. Burton,
Washington, D. C.

Report to me today from apparently reliable source that two special inspectors have been appointed to investigate us and report to Postmaster General. Please verify and advise at once. W. D. Mahaney.
Paid.

Col. Dyer: Q. You say you sent that meassage? A. I did.
Q. In answer to that, did you receive this *meassage from* Washington? A. (after examining paper) I did.

Col. Dyer: I offer that reply in evidence.

Judge Krum: We object to this for the same reason as before.

Objection overruled for the same reason. To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Counsel for the Government here read the telegram, dated Washington, Feb. 27, addressed to W. D. Mahaney, and signed J. R. Burton, which telegram is in words and figures as follows, to-wit:

181 Postal-Telegram Cable Company.
124

Received at Laclede Building, 4th & Olive Sts., St. Louis, Mo. k27 CH. N. 15-collect.

Washington, D. C., Feby. 27th-03.

Mr. W. D. Mahaney,
Care Rialto Grain & Securities Co.,
Rialto Bldg., St. Louis, Mo.

No complaint in the department against you will write full particulars by tonights mail.

J. R. Burton.
1151AM.

Col. Dyer: Q. Now, after having seen these messages, can you state whether one or both of the letters that were destroyed referred to this matter about which you were writing or telegraphing? A. One of them did.
Q. Can you state the contents of that letter which you destroyed?

Objected to as immaterial for the reasons already indicated. Objection overruled. To which ruling by the court the defendant, by his counsel, then and there duly excepted.

A. I cannot state the contents, except that I know they were confirmatory of that telegram.

Q. I will get you to state whether, at the time of the payment of this $500—you have said that nobody was present at the time you gave the money to Senator Burton; was there any conversation had in reference to that payment, after you had paid it to Senator Burton, in the presence of anyone else? A. There was.

Q. State who was present after you had made payment, and what was said in the presence of Senator Burton, or by him, in that conversation? A. Hector McRea.

Q. *Who was Hector McRea?* A. *He was comptroller of the* Rialto Grain and Securities Company. He came into the office shortly after I had paid the Senator, and I explained to him that—

Judge Krum: This was in the presence of the Sena-
182 tor, was it?

A. Yes sir. That we had for the time being, severed our connection; that the Senator had been paid and had expressed his willingness at any time, to respond to a telegram in case we needed him. That is as far as I recollect.

Q. The business that was transacted there, after Maj. Dennis went away, was done under your supervision as the vice president, I take it? A. Yes.

Q. Did you send this message to Senator Burton on the 14th of February, 1903? A. (After examining paper) That is mine. I sent that.

Judge Krum: We object to that on the ground that the telegram itself shows that it has nothing to do with this case.

Objection overruled; to which ruling by the Court the defendant, by his counsel, then and there duly excepted.

Counsel for the Government here read the telegram dated February 14, 1903, addressed to J. R. Burton, and signed W. D. Mahaney, which is in words and figures as follows, towit:

2/14/3

Hon. J. R. Burton,
Washington, D. C.

Thanks for letters. State Investigating Committee here, asking for information. Harlan says no occasion for anxiety. All we want is unbiased investigation. Do you think you can do anything to help situation? Check mailed today.

W. D. Mahaney.

Paid.

Col. Dyer: Q. You sent that? A. Yes sir.

Q. Did you receive this message from Senator Burton, dated Washington, Feb. 17th, 1903? A. (after examining paper) I did.

Judge Krum: I submit this telegram obviously has nothing to do with this case.

Col. Dyer: I propose to ask him what paper it was, whether the Globe Democrat or the Westliche-Post.

183 Judge Krum: Is that telegram in reference to the check?

Col. Dyer: Yes sir.

Judge Krum: We withdaw the objection.

Counsel for the Government here read telegram dated Washington February 17, 1903, addressed to W. D. Mahaney, signed J. R. Burton, which is in words and figures as follows, towit:

Western Union Telegraph Company
Received at 412 & 414 Pine Street, St. Louis, Mo.
Standard Time
1401

4018 CH OP HS 20 Paid Govt.
St. Washington DC 17

Mr. W. D. Mahaney,
Rialto Bldg.,
St. Louis, Mo.

Did you send paper Saturday it has not arrived.
J. R. Burton.

Col. Dyer: Q. Did you send him in answer to that this message dated February 17, 1903? A. (after examining paper) Yes sir.

The Court: Q. What does that paper refer to, a check? A. Yes sir.

Col. Dyer: Q. A check of the Rialto Grain and Securities sent to Washington A. Yes sir.

Counsel for the Government here read telegram dated February 17, 1903, addressed to J. R. Burton, and signed W. D. Mahaney, which is in words and figures as follows, to wit:

2/17/3

Hon. J. R. Burton,
Washington, D. C.

Was called away unexpectedly Saturday. Forgot to mail paper. It was sent to you yesterday.
Paid. W. D. Mahaney.

184 Cross-Examination

By Judge Chester M. Krum:

Q. In the discussion between Senator Burton Mr. Harlan and myself on the day before Christmas, at the office down here

on Fourth and Olive Streets, was not the proposed appearance of Senator Burton in the case against Major Dennis disposed of on the ground that it would appear to be over-loading the case with lawyers, rather than his presence here would tend to antagonize Mr. Dice? A. My understanding was as I have stated.

Q. Who made the suggestion that Mr. Burton better not appear because of the possibility of some friction between him and Mr. Dice? A. It was either Senator Burton or Mr. Harlan. My recollection is it was the Senator.

Q. I didn't [to] it, did I? A. No sir, I don't think you did.

Q. I was there? A. You were there.

Q. Major Dennis had been indicted by reason of the transactions of the Brooks Brokerage and Commission Company, hadn't he? A. Yes sir.

Q. And it was that indictment we were discussing there? A. Yes sir.

Q. Senator Burton had been employed by the Rialto Grain and Securities Company to take part in the defense of that case, hadn't he? A. I did not understand and was not told the terms of his employment. But he did discuss the case with you there that night.

Q. As I understand it, Mr. Mahaney, you have no personal knowledge, acquired from Senator Burton, or from Mr. Harlan, of the details or conditions of the agreement under which Senator Burton was employed by the Company. Your information on that subject was obtained, as I understand it, from Major Dennis, is that correct? A. No sir, from Mr. Harlan.

Q. Were you informed by Mr. Harlan? A. What he said to the Senator.

185 Q. And that is the only information you had with reference to what the contract was between the Senator and the Company? A. That is all.

Q. Now this check to which these telegrams relate, was a check of that date, which has been read in evidence here, wasn't it? It was sent to him under the contract that had been made with him? A. That first check was sent by me under the instructions of Mr. Harlan.

Q. I do not mean the check of Nov. 22, but the check that this telegraphing was about. That was sent under the contract, wasn't it, to meet a payment that was due at that time? A. A payment that I understood to be due to Senator Burton as salary.

Q. And this money you paid him on the 26th of March was also paid, as you understood it, by reason of the contract between the company and the senator, wasn't it? That is, the contract was ended, and this amount was due as the payment

called for by the contract at that time; that is correct? A. I did not so understand it, that the contract was ended, until I had explained to the Senator that we were hard up, and so on.

Q. The contract was ended after you made the payment? A. Yes sir, his services ended then.

Q. When the payment was made, it was made under the contract, wasn't it, and by reason of the contract? A. Yes sir.

Q. The indictment you have refered to as being discussed by Senator Burton, Mr. Harlan and myself, was the indictment upon which Major Dennis was tried here in this court, wasn't it? A. Yes sir.

Q. And Senator Burton did not in fact take part at that trial? A. No sir.

Q. The defense was conducted by Mr. Harlan and myself, wasn't it? A. Yes sir.

186 Redirect Examination

By Col. Dyer:

Q. Judge Krum has asked you about the payment of money under a contract; you say that his services were not dispensed with until you made the payment to him upon the 26th of March. That is when his services were dispensed with? A. Yes sir.

Q. Your understanding was that he was on a salary of $500 a month, was it? A. Yes sir, that is what I was told by Mr. Harland.

Q. And that his services were to cover what?

Judge Krum: We object to what Mr. Harlan told Mr. Mahaney.

Col. Dyer: I suppose that objection is well taken.

The Court: I think it is, if the information came from Mr. Harlan.

William A. Jones a witness of lawful [—], produced, sworn and examined on the part of the United States, testified as follows:

Direct Examination

By Col. D. P. Dyer:

Q. Your name is William A. Jones? A. Yes sir.

Q. Will you state your present place of residence? A. Washington, D. C.

Q. And your official position at Washington? A. Commissioner of Indian affairs.

Q. How long have you been commissioner of Indian affairs? A. About seven years.

Q. Do you know Senator Burton? A. I do.

Q. How long have you known him? A. Two or three years. I don't remember exactly when I met him first.

Q. Do you know a man by the name of McGowan A. Yes sir.

Q. S. M. McGowan? A. Yes sir.

Q. In February, 1903, what connection, if any, had McGowan with the Indian Commissioner's office? A. He was superintendent of the Indian School at Chetoka, Oklahoma.

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Q. I will get you to state whether or not in February, 1903, you had a visit from Senator Burton, and whether, during that visit, anything was said about McGowan?

Judge Krum: We object to that. I concede it would be competent for the Government to show that on this occasion, if it were a fact, Senator Burton indicated to the Indian Commissioner what his own relations with the Rialto Grain and Securities Company were. But that the Senator made an inquiry of the Indian Commissioner in regard to McGowan, I submit is not competent.

The Court: I would like you to state the purpose of this inquiry. If it relates exclusively to a conversation with the Indian Commissioner in his department, of course it is not competent.

Col. Dyer: I have undertaken to pave the way for this examination by showing the correspondence between the Rialto Grain and Securities Company, and Senator Burton, at Washington, in reference to McGowan's connection with that company. Those letters are in evidence now. I propose to show by this witness, if I can, that he desired the commissioner, under whose direction this agent was, to ask him to abandon his claim against the Rialto Grain and Securities Company, with a view of settling those matters.

Judge Krum: That is still incompetent.

Mr. Lehmann: For two very obvious reasons. One is, that the claim of McGowan against the Rialto Company is not a matter in which the Government is interested, and consequently an occurrence hardly to be said in the Indian department, even; or rather, on the premises of the Indian department. That is, the nearest it comes to being any department of the Government.

Col. Dyer: Your Honor will see the gist of this offense if there is an offense, is for services rendered the Rialto Grain and Securities Company before a department, towit: The Post Office Department. I do not care whether the services were rendered in the office of the Post Master General, or within the building occupied by the Post Office Department. It is competent for me to show that he was rendering these

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services to the Rialto Grain and Securities Company, which would ultimately reach the Post Office department.

The Court: Do you propose to show that he requested Mr. Jones to go to the Post Office department?

Col. Dyer: No sir.

The objection is sustained.

Col. Dyer: I propose to show nothing about that, and can only show the conversation that took place between them in the light of these messages I have read; that he went to the commissioner, making inquiry as he was asked to inquire, as to this matter affecting the Rialto Grain and Securities Company. It was done for the purpose of showing services rendered by the defendant to the company for the company at Washington. He might go and talk to anyone.

The objection was sustained.

Col. Dyer: Q. Did you have a conversation with him?

A. I did.

Q. In that conversation did he state to you what relations he bore to the Rialto Grain and Securities Company?

Judge Krum: We object to that as improper.

The Court: I think that is quite admissible. If he said anything concerning his relations to the Rialto Grain and Securities company; the objection is overruled.

A. He did not, to my recollection.

Judge Krum: I withdraw the objection.

Col. Dyer: With your Honor's ruling, of course I submit to that, I will not prosecute the inquiry further with Mr. Jones I wanted to draw out the conversation between Mr. Jones and Senator Burton in regard to this matter, and if that is not competent, I will not inquire further of Mr. Jones.

Counsel for the Government offers in evidence a letter dated Dec. 2, 1902, addressed to the Hon. J. R. Burton, signed by Mr. Harlan, and also the reply to that, being a letter dated Dec. 9, 1902.

189 Judge Krum: We interpose the same objection to these letters, as indicated before, as being incompetent.

Objection overruled, to which ruling by the court the defendant, by his counsel, then and there duly excepted.

Counsel for the Government here read the letter dated Dec. 2, 1902, addressed to J. R. Burton and signed by Mr. Harlan; and also the letter of Dec. 9, 1902, addressed to Thomas B. Harlan,

and signed, J. R. Burton; which letters are in words and figures as follows, to-wit:

December 2, 1902.

Hon. J. R. Burton,
c/o Senate Chamber,
Washington, D. C.

My Dear Sir:—On Saturday night, I wired you that indictments had been returned, bonds given, etc. I was somewhat surprised on my return here Saturday night, to be met at the train by one of the clerks of the Rialto Company, who informed me that Major Dennis and Mr. Garland had been indicted and that day arrested. Later on, I learned also that Mr. Brooks had been included in the indictments, and had also been arrested and given bond. I have not yet seen the indictments, and do not know whether these parties were indicted jointly, nor do I know the specific charges against them. I expect to have a copy of the indictment by tomorrow.

Thus you will see, that all efforts to prevent this action, were defeated almost before we got started. The question is, how to meet the situation as it now exists.

As was to be expected, the fact of the indictments was telegraphed as a news item all over the country, and to-day's mails have brought in several communications threatening in their nature; and the balance of the week will probably bring a great many more. Wherever a party requests his account closed, the same will be done promptly, and whatever he is entitled to will be at once remitted, and such accounts will probably never be heard of again. It is where parties have lost money by the action of the market that will give us the most trouble, as they will undertake to blackmail the Company into paying them something that they are not entitled to. In all such cases, we have determined to stand strictly on our rights, and the result will probably be numerous complaints pouring into Washington from different parties of the country. We will be able to meet each one of these cases individually, and show the Post Office Department a clean record. It is more the fact that the Post Office has advertised its intention to take hold of these cases that will bring the complaints, than any justness that they will contain. Locally, I believe we will be able to control the situation, as this business has been pretty thoroughly gone over by the Inspectors, and they understand just what we are doing and how we are doing it.

At your end of the line you will, of course, use your own judgment in handling the situation. We will, at all times, be glad to observe any request made by the Post Office Department, or to submit to any examination that they may direct.

190 J. R. B. -2-

The cases here are set for trial on the 6th of January, and Judge Krum and I are preparing now for trial. We will get all the evidence in shape; I will thoroughly brief the law pertaining to the cases, and when we have got matters worked out, we will submit the whole case to you for your consideration, and would certainly much appreciate it if you could find it convenient to be here to participate in the defense.

Yours very truly,

T. B. H. THOS. B. HARLAN.
E. E.

United States Senate
Committee on
Forest Reservations and the
Protection of Game.

December 9, 1902.

Mr. Thomas B. Harlan,
St. Louis, Mo.

My Dear Harlan: There is no man by the name of J. H. Bowman who is a post office inspector. This man Bowman in impersonating a post office inspector violated the statutes, and laid himself liable to punishment. The man operating in Colorado Springs was also a fraud. There has gone from this office no instructions whatever about the Rialto Company, and there is nothing in this office against you at this time. The matter in St. Louis, as you know, is in the hands of Mr. Dice there. I herewith return the letter.

I would suggest that you prepare carefully the case of Dennis for early next month, and I have learned to know that you must watch carefully that the jury is not set up on you. These are all important questions that you must carefully consider.

I will take care of things at this end of the line.

Please keep me constantly advised.

Faithfully yours.

J. R. BURTON.

A recess was here taken until 2:00 o'clock p. m.

March 24, 1904, 2:00 p. m.

Court reconvened pursuant to foregoing adjournment.

Col. Dyer: I offer in evidence a letter covered by the stipulation, dated December 3, 1902, of Thomas B. Harlan, to J. R. Burton.

191 Judge Krum: We submit that that is not competent, being merely Mr. Harlan's declaration to Senator Burton.

The Court: You may read the letter.

To which ruling of the court the defendant, by his counsel, then and there excepted.

Counsel for the Government here read the letter dated Dec. 3, 1902, addressed to J. R. Burton, signed Thomas B. Harlan, which is in words and figures as follows; towit:

December 3, 1902.

Hon. J. R. Burton,
c/o Senate Chamber,
Washington, D. C.

My Dear Sir: —

On Monday of this week, a man dropped into the office of the Rialto Company by the name of J. H. Bowman, of Allentown, Pa. He had an account with the Company, having invested about $1500.00, on a part of which he had some loss, and other parts, some gains. I was not here at the time, but he saw Mr. Leftwich, who is Vice-President of the Rialto Company; and, after representing himself to be a Post Office Inspector—in fact, he produced a business card to the effect that he was a Post Office Inspector—he undertook to use his official position to force a settlement of his account contrary to his just rights, and did succeed by reason of his representation, in getting a little the best of the Company.

Now, this morning's mail brings us a letter from Colorado Springs, from a Mr. Shove, which I enclose to you, and which indicates that some officer of the law—presumably someone that would leave the inference that he was a Post Office Inspector—had called on Mr. Shove. It is my opinion, that these fellows are not what they represent themselves to be. But if they are Post Office inspectors, then it would appear that some order had been issued—evidently from headquarters—to try to catch the Rialto Company in a trap. This they cannot do by any honest methods, nor is the matter one of much consequence, except we would like to know if we are being investigated in this manner.

I call your attention to it merely as a matter for your own information.

I have just returned from a consultation with Judge Krum. He had a copy of the indictment, and we considered the same, and both feel that the case against Dennis and Garland will be taken from the Jury. Up to the present time, I have found no authority to sustain the Government's position, nor do I see how they can make a case against either Dennis or Garland.

Today's mails have brought in a number of letters enclosing newspaper clippings, but most of the letters are very fair, and if the situation gets no worse than it now appears, the Rialto

Company will have but little trouble in getting through with the situation. Will keep you fully informed.

Yours very truly,
(Signed) THOS. B. HARLAN.

P. S. Bowman represented that he was connected with Philadelphia office.

T. H. B. E. E.

192 Counsel for the Government offered the letter of Feb. 11, 1903, addressed to Thomas B. Harlan and signed J. R. Burton.

Judge Krum: We object to this letter, if the court please for the reasons indicated heretofore, and in addition that the letter does not appear to relate to any matter which is the subject of inquiry here before the court, and it is not improper for me to indicate to your Honor that not only does the letter apparently not refer to any matter before the court, but it does not in fact refer to any such matter. It relates to an effort to have Mr. Dice, who had in his possession the books of the Brooks Brokerage Company, turn them over to Mr. Dennis, after the trial of the Dennis case. Your Honor remembers what those books were, as they were used in court here. After the disposition of that case, the proposition on the part of Mr. Dice was to turn those books over to the State authorities, and an effort was made to have him turn them back to Major Dennis, to whom they belonged, instead of the State authorities, and this letter relates to the efforts that were made in that direction. The letter does no refer to any matter that was being investigated by the post office department, in the sense of complaints, or anything of that kind, against the Rialto Company.

The Court: I will say again, so there may be no misunderstanding as to the view the court has in admitting this testimony, that the letters, telegrams,—this letter among others,—are admitted to go to the jury, to show the relations existing between the defendant in this case and the Rialto Grain and Securities company, with the view of aiding the jury in the determination of the situation which was stated by counsel in their opening, as to what his true relation was. Whether his relation was aiding, assisting, and rendering service before the department, or whether his relation was entirely exclusive of that; and for the purpose of acting as general counsel
193 upon the situation. That is the sole ground upon which this letter, and other letters, have been admitted. As to this letter, inasmuch as it bears upon his relations to the Company, and his services rendered, that objection is overruled.

To which ruling by the court the defendant, by his counsel, then and there duly excepted.

Counsel for the Government here read the letter of Feb. 11, 1903, addressed to Thomas B. Harlan, and signed J. R. Burton, which letter is in words and figures as follows, to-wit:

United States Senate
Committee on
Forest Reservation and the
Protection of Game.

Feb. 11, 1903.

Mr. Thomas B. Harlan,
St. Louis, Mo.

My Dear Harlan:

I have your telegram telling me that things were satisfactory between you and Dice. I hope you are not letting him mislead you in any way.

I will be in St. Louis the fore part of next month, so soon as Congress adjourns, and shall aim to remain several days.

Be sure and keep me advised if there is anything to do at this end of the line before going away. I have tried to keep the department in a good humor with Major Dennis, and think I have succeeded.

If agreeable, on receipt of this, I wish you would have my month's pay send in, so I can reach it by Monday next.

Faithfully yours,
J. R. BURTON.

194 W. E. Cockran recalled, having been heretofore duly sworn, testified as follows:

Direct Examination

By Col. Dyer:

Q. You have been sworn in this case? A. Yes sir.

Q. And your name has been given to the jury? A. Yes sir.

Q. I will get you to state, Mr. Cochran, whether, at any time between the 18th of November, 1902, and the 26th day of March, 1903, you saw the defendant, Senator Burton, at the Post Office Department in Washington? A. Yes sir, I did.

Q. Will you state to the jury the first time that you saw him there when any allusion, if any such was made, was made to you in reference to the Rialto Grain and Securities Company? A. I cannot fix the date of the first visit from any independent recollection; but my best recollection is that the first visit was made before that case had been sent out for investigation.

Q. Do you recall any visit that was made to the department in reference to the complaints of Hout and Evans, and whether you gave him any information as to the pendency of those complaints? A. Yes, sir, he called at the department sometime after the case had been made up, and I told him that the case

had been made up and sent out for investigation, and gave him the names of the complainants.

Q. Was that the first visit to the department in reference to the matter, or had he been there before? A. I stated that my recollection was that he had made a visit of inquiry before any case had been made up and sent out for investigation.

Q. Can you state what he said, in that inquiry, substantially?

195 *Judge Krum: I submit that is* not material in this case; that was before anything had been begun, on the theory of the Government.

Objection sustained.

Col. Dyer: Q. What transpired at this interview, when you told him of the complaints of Hout and Evans, and the case being made up against the company, any further than that? A. He said that all the difficulty arose from Major Dennis's connection with the Brook Brokerage and Commission Company. I will have to correct that—that all the trouble arose from that company, and that Maj. Dennis had succeeded and formed a new company which had taken over the business of the old company.

Q. What, if anything did he say with reference to the Rialto Grain and Securities Company that had been organized after the Brooks Brokerage Company had been organized? A. He said that Company was doing a straight business and was all right.

Q. After you gave him this information as to the complaints of Hout and Evans, when and where did you next see him, if at all, in reference to the matter of the Rialto Grain and Securities Company? A. I saw him again at the department, but I could not fix the date, only he made an inquiry whether certain persons who claimed to be inspectors were inspectors, and I gave him the information that the persons whose names he gave me were not inspectors.

Q. Do you recollect whether in that inquiry a man by the name of Bowman was mentioned as one? A. I could not recollect that, from my own recollection.

Q. What was his inquiry and what did he say in reference to the matter, at the time he made this inquiry? A. Well, he wanted to know if such persons were inspectors and if they were investigating this case.

196 Q. Was that substantially all that occurred? A. I think so, yes sir.

Q. When was the next time you saw him to talk to him in reference to the matter? A. The next visit that I recall was about the 24th of January, 1903.

Q. May I refresh you a little on that, probably, by asking you this question: Did you see him at the department in company with Maj. Dennis, in December, before? A. Yes sir, I did.

Q. Now you may state, have you any definite recollection as to the date of that visit? A. Only the nearest approach I could make to the date was that it was after the indictment and the arrest of the officers of the Rialto Grain and Securities Company.

Judge Krum: Q. You mean of the Brooks Brokerage Company.

Col. Dyer: Q. Including Maj. Dennis? A. Yes sir.

Q. Will you state to the jury what he said to you at that time and upon that occasion? A. Well, he said first that he wanted me to see Maj. Dennis and see what kind of looking man he was, and he repeated the assurance that his company was endeavoring to do a straight business, and also the former statement that all the troubles arose from the conduct of the Books Brokerage and Commission Company.

Q. Was that the first time you ever had seen Maj. Dennis? A. Yes sir.

Q. Were you introduced to him by the Senator? A. I was.

Q. Now, what else was said in that interview, if anything? A. I do not recall anything except the general statement that they did not wish to antagonize the department, and that they wanted to do just exactly as the department wanted them to do.

Q. In what respect, did they say? A. In the con-
197 duct of the business of the company.

Q. Was there anything said in reference to conforming to the rules of the department as to the kind of literature that should be sent out through the mails at that time? A. No sir, I do not recall any such statement.

Q. When, after that did you see him next? A. About the 24th of January, 1903.

Q. State where you saw him then? A. At my office in the department.

Q. What occurred at that time, and what was said? A. He stated that Mr. Dice had taken a book or the record that had been turned over to him in the investigation of the case in the United States Court, and that after that case had been thrown out, he was taking them over to the State courts for use here. And he said that those records had been surrendered voluntarily and it was a breach of faith on the part of Mr. Dice to make that use of them. And he asked that Mr. Dice be ordered to return the books.

Q. What was said by you and him any further? A. I told him that Mr. Harlan who was the person who wanted the books back should see the United States attorney, and Mr.

Dice would be governed entirely by whatever instructions he might give. But the Senator insisted that something ought to be done about the matter, and at my suggestion we went to see the 4th Assistant Post Master General, and the case was stated to him.

Q. State what occurred between the 4th Assistant Post Master General and Mr. Burton and yourself on that occasion when you got there? A. There was practically the same statement that was made to me and the same request; that Mr. Dice be ordered to return the books.

Judge Krum: Q. These were the books of the Brooks Brokerage and Commission Company, weren't they? A. I think so. Of course I never saw them. But it was a book that had been surrendered to Mr. Dice, in the investigation that he made.

Judge Krum: That is a fact, isn't it Col. Dyer, that it was a book of the Brooks Brokerage and Commission Company?

Col. Dyer: That is true.

198 Q. What was said further by the 4th Assistant Post Master General? A. The 4th Assistant Post Master General also declined to say that the order would be given. Then, my recollection is, we all three went to the Post Master General and the case was submitted to him. The Post Master General, after considering the matter, directed me to send a telegram to Mr. Dice.

Q. After the conversation had with Senator Burton and yourself and the 4th Assistant Post Master General? A. Yes sir.

Q. I show you a message and ask you whether that is the message that was sent to Mr. Dice after your visit to the Post Master General in company with Senator Burton? A. (After examining paper) It is.

Q. That is the dispatch you sent? A. Yes sir it is.

Q. According to the direction of the Post Master General after the visit and the conversation had there in reference to this matter, between the 4th Assistant Post Master General, yourself, the Post Master General and Senator Burton? A. Yes sir.

Q. This dispatch seems to have your name as the inspector; by whom was this dictated? A. By the Post Master General.

Col. Dyer: I offer to read that dispatch.

Judge Krum: It is obvious, your honor, that this telegram does not relate to any matter involved here, and accordingly we object to it.

Col. Dyer: This shows, as has already been shown in the course of this trial and by these papers, that this matter of the trial of Dennis, was over long before this dispatch was

sent, and it is offered for the purpose of showing the continuing relations that existed between this defendant and Dennis, who was the President of the Rialto Grain and Securities company.

Judge Krum: There is no dispute at all about that, but we submit that whatever occurred,—Now, Mr. Cochran has
199 explained what occurred in reference to these books. Your Honor has observed from the testimony they were the books of the Brooks Brokerage Company. What was contained in those books did not concern the Rialto Grain and Securities Company at all. The books were used in evidence here before your Honor, as your Honor recalls, and after the trial of Garland and Dennis, there was no further occasion for the retention of those books by any of the officers of the Government, and this testimony merely goes to show that Mr. Burton, acting for the Rialto Company, if you please, as he undoubtedly did, sought to have those books returned to Maj. Dennis. Now, there was nothing done by the defendant in that regard which would involve any culpability with reference to the charge upon which the defendant is now on trial.

Objection sustained.

Col. Dyer: Q. When, after that visit to the Post Master General, did you next see Senator Burton? A. On the evening of the 5th of February, 1903.

Q. Where did you see him? A. At his office in the Senate Annex, in the Maltby building.

Q. How did you come to meet the Senator there? A. The Senator's Secretary, Col. Smith, telephoned me in the course of the afternoon, saying the Senator would like to see me, and asked if I would not call at his office on my way home. The Maltby building is about half way between the department and my house, and I did call on him.

Q. Will you state, as nearly as you can, all that was said on that occasion in reference to the Rialto Grain and Securities company? A. The Senator either showed or read me a telegram from Mr. Harlan, stating that they had not got possession of this book or books, and that Col. Dyer had stated he had no further use for them, and the Senator again said that if that was the case, they ought to be returned, that Mr. Dice was
200 acting in bad faith in insisting upon keeping the books. I promised to send a telegram of inquiry the next morning, and I did send one.

Q. What else occurred in that interview? A. After that matter was settled the Senator said to me "Cochran, I want to appear in this and other cases before the department but I want it understood that in so doing I shall never antagonize the department, and my efforts shall rather be used the other way".

He said he could make some money in that way and apply it on old debts? That he had lost very heavily during the panic and that he had paid in—I cannot tell exactly in what time, but my recollection in during his term as senator—$70,000 on which he was not legally liable, but that if there was any just claim against him he would never plead the statute as a defense.

Q. What else was said there in that conversation? A. He said there was not anything wrong about this. That a number of senators, notably Senator Edmunds, had very materially increased his income by such practice and that it was all right.

Q. Was that substantially all that took place there at that time? A. Nearly all, I think so.

Q. What if anything, was said by him in that conversation with you, that when he overstepped the bounds, what was to be done? A. He asked me to warn him.

Q. What case, or cases did he say he would like to represent before the department? A. Well, he said in this and other cases. The case we had been discussing was that of the Rialto Grain and Securities Company, as I understood it.

Q. Did he mention any other case in which he would like to appear? A. No sir.

Q. After that time, did you have any further meeting or conversation with him in reference to the Rialto Grain and Securities Company? A. I do not recall any other until after the indictment was returned against the Senator.

201 Q. Then, after this indictment was returned against him, did you have any conversation with him in reference to the matter? A. Yes sir, I did.

Q. State what that was? A. On the afternoon of the day it became public, Col. Smith came down to the department and asked me if I would not call on the Senator that evening.

Q. Col. Smith is the senator's secretary? A. Yes sir. I told him I would, and I did call on the Senator in company with Inspector Vickery of Cincinnati. The senator asked me if Mr. Vickery was Post Office inspector, and I told him he was? He said he was glad I brought him along, because he wanted to talk over the matter with me. I said to him, "First, Senator, I think it is only fair that I should say to you that I have been a witness before the grand jury and that I shall be a witness against you if this case comes to trial, and in addition to the official proprieties, I having been sworn to secrecy, I thought I could not discuss the case with him. He said, nevertheless he wanted to recite to me what his recollection was of what had occurred—he stated that his memory was good. He went on to say that whatever he had done had been done as an attorney for the company; that he had no idea that he had in any way committed any impropriety in visiting the department on matters of this kind; that he had visited the Pension department

a number of times; and that if it was wrong for him to go and see a department officer in regard to a matter he didn't know it, and if it was wrong he would not do it any more. He said he had consulted with Senator Platt, of Connecticut and taken his advice as to whether it was wrong for him to appear in such matters, and the senator had assured him there was no impropriety in doing that. He also went on to say that he could not imagine what section of the law he could possibly have violated and asked me. I told him I had not seen the indictment, but my understanding was that it was based on section 1782 of the Revised Statutes of the United States. He asked me what that was, and I told him it was very comprehensive in its
202 terms, and I could not undertake to recite it, but that as I recollected it, in general terms it made it an offense for a senator or member of congress to practice before the department. And he said he had not been practicing before the department.

Q. Was anything further said at that time? A. I think that was substantially all of it.

Q. When, after that time, had you any further conversation with him in reference to the matter? A. No, sir, I had none.

Q. There was one question I intended to ask you before while you were on the stand, in reference to your authority in these matters while this case was pending, under the rules and regulations of the department and the authority conferred upon you by the rules and regulations, and by reason of your official position; I think you stated that you had authority to discontinue this examination if you saw proper, and also direct Col. Col. Dice to, that is true? A. Yes, sir.

Q. Then, by the same authority could you have taken the case out of one inspector's hands and placed it in anothers? A. Yes, I could have done so.

Cross-Examination

By Judge Krum:

Q. This last interview before the indictment was, as I understand you, in February? A. February, 1903.

Q. And on what date in February? A. The 5th.

Q. That was the first time, wasn't it, that Senator Burton made the inquiry of you of the description you have given here. That is, the first time that the subject of his representing or appearing for the Rialto Grain and Securities company was mentioned? A. Yes, sir.

Q. And that was the only time, was it? A. Yes, sir, the only time—well, except the last.

203 Q. I mean, before the indictment? A. Yes sir.

Q. Now you say he stated after the indictment, that he had been practicing in the department? A. No sir, I didn't say that.

Q. Then I misunderstood you. A. He said he wanted to appear before the department in this and other cases.

Q. But I mean after the indictment, what was the statement he made to you? A. He said he had appeared before the department as an attorney and everything he had done had been done as an attorney of the company. After I had stated what I thought was the substance of section 7182, he said he had not been practicing before the department.

Q. Then I misunderstood you? A. Yes sir.

Q. At any time from the beginning of Senator Burton's indication to you that he had any connection with the Rialto Grain and Securities Company, there was no discussion between you and him, was there, as to the issuance or non issuance of a fraud order as it is called, against the company? A. I think not.

Q. This interview on the 5th of February, as I understand you, related, for the most part, to this controversy about the books of the Brooks Brokerage Company? A. Yes sir, that is what the senator wanted to see me about.

Q. I understand you, then, that you are not able to recall any occasion upon which the senator made any representation to you or had any conversation with you with reference to the issuance of a fraud order? A. No sir.

Q. I understood you correctly, didn't I, Mr. Cochran, that at the time of Senator Burton's first inquiry, that is in regard to these two letters from the ladies in Albany, Mrs. Hout and the other one, those letters had already been referred in the course of the business in the department, to St. Louis,
204 and were in the hands of the inspector here. Was that correct, or hadn't that happened at that time? A. No sir, I stated my best recollection was that the senator had made inquiry before any complaint whatever had been received.

Q. I know. But the inquiry he made after the complaints were in, was made after those complaints had been sent out to St. Louis? A. Yes sir.

Q. So they were not pending before you, or pending before any officer of the Post Office department in Washington? A. Well, they were in the hands of the inspector in charge at St. Louis.

Q. That is what I mean, they were out here? A. Yes sir.

Q. The senator, therefore, was not shown those letters upon the occasion of his visit to your office for the purpose of that inquiry because they were here, and of course would not be shown to him in Washington? A. No sir. The only informa-

tion I could give him was the carbon, which would simply have on it the name of the complainants.

Q. You could give him that information and that was all the information you could give him there? A. Yes sir.

Q. There was no discussion between you was there, on this occasion, of the merits of the representations of Mrs. Evans or Mrs. Hout? A. No sir.

Q. The only thing that was indicated to the senator by yourself was, that, as appeared by this wrapper, these two complaints had been filed and had been referred to the proper officer in St. Louis? A. Yes sir.

Q. It is a fact, isn't it, as you recall, this occasion when Senator was advised of these two complaints, was the only one upon which he was advised of any complaints having been lodged against the company? A. That is my recollection of the matter.

205 Q. At any of these interviews between Senator Burton and yourself prior to the indictment, did he indicate to you that he would not undertake to appear in the department as against the United States? A. He did.

Q. Are you able to recall on which occasion that occurred? A. Why, I cannot with any certainty. The senator told me that several times.

Q. Disclaimed, whenever the occasion arose, didn't he, any purpose or intention to appear there against the United States? A. I think he did, yes sir.

Q. Do you recall his having indicated that so far from desiring to appear as against the United States, if an occasion arose when summary action was necessary that he did not even ask to be notified with reference to it. A. No sir, I cannot [quire] recall that. He did say, however, that he would not antagonize the department, no matter whether he thought they were right or wrong or not, that even if he thought the position taken by the department were wrong, even then he would not oppose them.

Q. This wrapper shows that on the 8th of November, 1902, a complaint was filed by F. R. Fravel: That fact was not called to the attention of Senator Burton, to your knowledge, was it? A. I do not think so. If I might explain how the information was probably secured?

Q. Yes, certainly. A. Instead of going down to the record myself, I probably asked my secretary to go and see whether there was a case, and get the names of the complainants, and he probably would simply take down those on whose complaints the case was made up.

Q. What I want to get at is the fact whether or not these complaints, other than those of the two Albany women, were called to the attention of the Senator? A. My best judg-
206 ment would be that they were not. I have no recollection of that.

Q. And that would cover the complaint of Arthur M. Allen of January 5, 1903, and S. A. Warner, that is the Pittsfield lady, of January 21, 1903; those are all that have been introduced here. That would cover all of those? A. Yes sir.

Redirect Examination

By Col. Dyer:

Q. On this talk that you had with him, in which he said he would not antagonize the department, how many times was that repeated to you, that he would not antagonize the department? A. You mean on how many different occasions?

Q. Yes. A. Well, I should say possibly three times.

Q. I do not know that you answered fully in your first inquiry, on your direct examination, and I will ask the question now: What statements, if any, other than those you have already given, did he make in reference to Major Dennis, and the character of the man? A. I cannot recall any particular statements that he made with reference to him, except those in connection with Mr. Brooks.

Q. What did he say to you in reference to the character of Dennis, if anything? A. He said Dennis was all right and was trying to do a straight business.

W. W. Chatterton, a witness of lawful age, produced, sworn and examined on the part of the United States, testified as follows:

Direct Examination

By Col. D. P. Dyer:

Q. What is your name? A. W. W. Chatterton.

Q. Where do you live? A. Washington, D. C.

Q. What is your position at Washington? A. Private Secretary to Mr. Cochran, Chief Post Office Inspector.

207 Q. I will get you to state whether you were present in the office of the Chief Post Office Inspector in December, 1902, when Senator Burton introduced Major Dennis? A. I was, yes sir.

Q. Can you state to the jury when they came in what, if anything, did Senator Burton say as to Major Dennis to the Chief Inspector? A. Well, he called attention to Major Dennis's personal appearance, that is, he said he wanted him to see what a fine looking man Major Dennis was.

Q. Do you recollect the date of that visit? A. I fix that on the 16th day of December, about the middle.

Q. About the middle of that month? A. Yes sir, 1902.

Q. Do you recall anything else that occurred there at that particular time? A. I do not know.

Q. Your desk in the office there was how far remote from that of the Chief Inspector? A. The desk itself is about two feet, but Mr. Cochran's seat is about eight or ten feet.

Q. How long did you remain there at that time, in the office? A. That I do not recall.

Q. You do not recall that? A. No sir.

Q. Did you see Senator Burton in the office of the Chief Inspector at any time before or after the middle of December, 1902? A. I saw him after that, yes sir.

Q. How often did you see him in the inspector's office after the middle of December? A. Well, he was in a great deal, but I only recall one particular time.

Q. What time was that? A. That was in January, January 24.

Q. Do you recall what occurred at that interview? A. I did not hear the interview itself.

Q. Well, what became of him after that interview? A. Senator Burton called and saw the Chief Inspector. I did not hear the interview. Then they went upstairs,—where, at that time, of course, I did not know, but afterwards—

Q. You learned afterwards where they had gone?

Judge Krum: From whom?

Col. Dyer: Q. Do not state where you learned it. I
208 do not ask you to state who told you; but they left the office together? A. Yes sir.

Q. But where they went, you did not know? A. I did not know at that time.

Q. You have no personal knowledge of where they went after they left there? A. No sir, no personal knowledge.

(No cross-examination.)

W. J. Vickery, a witness of lawful age, called, sworn and examined on the part of the United States, testified as follows:

Direct Examination

By Col. D. P. Dyer.

Q. State your name in full? A. William J. Vickery.

Q. Where do you live? A. I live at Evansville, Indiana, stationed at Cincinnati, Ohio, as Post Office Inspector in charge.

Q. How long have you been post office inspector in charge at Cincinnati? A. About seven years, as I recall it.

Q. Do you know Senator Burton? A. I was introduced to him in January of this year.

Q. January of this year? A. Yes sir.

Q. Where? A. At Washington, at the Maltby Building, in his office.

Q. By whom were you introduced to him? A. By Mr. Cochran.

Q. Will you state your recollection of what occurred at that interview at the Maltby Building in January last, between Senator Burton and Mr. Cochran, and yourself? A. At Mr. Cochran's request, I went with him in the afternoon, I think, of January 23, perhaps about five o'clock, to the Maltby Building, and Senator Burton and Col. Smith, his secretary, were in the office at that time. Senator Burton told Mr. Cochran that he was anxious to know why or for what he had been indicted—the indictment had been published that day, I believe. Mr. Cochran said it would be improper for him to state, inasmuch as he had been a witness before the Grand Jury and would,
209 if a trial followed, be a witness again. The section of the Statutes was inquired about, and as I recall it, there was an uncertainty as to whether it was 1782 or the one preceding or the one following. No copy of the statutes was there, and a memorandum was made of the number. Mr. Cochran said the statute was a comprehensive one and he would not undertake to quote it, but in effect it prohibited a senator or member of congress from appearing before the department; that he could not say anything as to what the charges were. I think he also mentioned that the United States Attorney at St. Louis had his testimony and could make known whatever he thought proper of that. Then Mr. Burton said he desired to repeat before Mr. Cochran his recollection of what had occurred. He said that he had appeared for this Securities Company as the attorney; that he had always sought not to antagonize or bias the department, that he desired, rather, that his client should come into harmony with the rules of the department. He said he had visited other departments, and I think the Pension Department was mentioned; that he would not do it if he thought it improper. He mentioned consulting some one as to the propriety of this, and that he certainly would not do it if he thought it was anything wrong. He said he had been employed in this case as attorney; that he had met them at St. Louis on his way there to or from a session of congress; that he had received a fee from them, a good fee, that he was not a cheap attorney and would not accept service unless they could pay; that it was intended or expected that he might be here at some trial, but afterwards that had been abandoned, they having determined it was not necessary, and he did not come. He again repeated that idea that he did not seek to antagonize the department in his appearing before it, and that he would not undertake anything that he supposed was prohibited by the law.

210 Q. You say that in that interview he mentioned the securities company; was the Rialto Grain and Securities company mentioned? A. The word Rialto was used. Of course I was not familiar with the company before that time, but that name was mentioned, the Rialto Grain and Securities Company.

Q. What further was said, if anything, in reference to his being the attorney for the company at Washington? A. I think the words used by Mr. Cochran, as to practicing before the department, I recollect the Senator said at the close, or near the close of the interview, that he had not been practicing before the department. At the start he made the distinction that he appeared only as attorney for the company and was not seeking—he didn't say that in words—at any rate the distinction was made between seeking anything wrong for the company, or biasing or antagonizing the department in any way.

Q. Was that about all that took place? A. Practically all. There was some general conversation there, and I think perhaps an agreement on Mr. Cochran's part, that Senator Burton had several times mentioned the fact that he did not want to antagonize the department.

(No cross-examination)

Richard H. Lindsay, a witness of lawful age, called on the part of the United States, being first duly sworn, testified as follows:

Direct Examination

By Col. D. P. Dyer.

Q. State your name in full? A. Richard H. Lindsay.

Q. And your occupation? A. I am a Washington Newspaper correspondent.

Q. How long have you been at Washington as a newspaper correspondent? A. I have been there this last time about two or three years.

211 Q. For what papers do you correspond? A. The Kansas City Star and the Kansas City Times.

Q. Do you know Senator Burton? A. Yes sir, I do.

Q. I will get you to state whether you met him at Washington in January of this year after it was reported an indictment had been found? A. No sir, I did not meet him.

Q. You did not see him? A. I did not.

Q. Did you have any talk with him? A. I had a talk with him over the telephone.

Q. You had a conversation with him over the telephone? A. Yes sir.

Judge Krum: How did he know it was Senator Burton?

Col. Dyer: Q. You may state to the jury how you knew with whom you were talking? A. I heard there was a dispatch received, and saw it, stating that Senator Burton had been indicted in St. Louis. Of course I wanted to send whatever end there was of that to cover in Washington for my paper. I called up Senator Burton's office by telephone; he was in the Maltby Building and I was in my office—No, in the office just above mine. Someone in his office said the senator would answer the 'phone in a few minutes; he came in answer to the 'phone; I asked who it was, asked if it was Senator Burton; he replied that it was, and we had some little conversation over the telephone, I don't know what, of a trivial character, and then I told him I had seen this dispatch that he had been indicted in St. Louis, and he said yes, he received a dispatch, and that began our conversation about that.

Q. I will get you to state whether or not at that time you took dictation from Senator Burton in reference to the matter? A. Yes sir.

Q. I will show you this paper (handing witness a newspaper clipping), dated Washington, January 23, 1903,
212 and ask you to look at it?

Judge Krum: I submit, if the court please, that it is not competent to refer to this witness to this memorandum to enable him to state what he received from Senator Burton.

The Court: It may not be necessary to refresh his recollection at all.

Col. Dyer: Q. I show you this clipping from the Kansas City Star; I gave you the wrong one at first—

Judge Krum: See if he can get along without it.

Col. Dyer: Q. Can you give to the jury the conversation you had with Senator Burton at the time for that paper? A. I think I could give the tenor of it, I do not know that I could repeat his exact language. The senator said over the 'phone that he had received a dispatch from St. Louis saying that he had been indicted there, and he said that he didn't know exactly what it was all about; that he was not guilty of any wrong doing; that he was going to St. Louis as soon as he could and insist upon a trial, and he said it was in reference to the Rialto Grain and Securities company. I believe, and that the only connection he had with it was through Major Dennis, who was an old friend of his who had been indicted, and he was Major Dennis's attorney; that he had gone to the department to see Mr. Cochran, I believe he said, with Major Dennis, on an occasion, and he had told Mr. Cochran he had come there to see what charges there were against his client,

and he had insisted to Mr. Cochran that he came as an attorney and not as a senator, in regard to the matter.

Q. What did you say to him then when he said he went there as attorney for the company? A. I told him that as I understood the indictment in St. Louis, it was on the ground that he had appeared before the department as an attorney, and he said he had assured Mr. Cochran that he did not want to interfere with the government's affairs in any way, manner, shape or form—something to that effect.

213 Q. What else did he say in reference to being attorney for the Rialto Grain and Securities Company, if anything, and what he was to do as such attorney? A. I don't think he said anything in my conversation with him. That he was employed to defend Major Dennis, who was an old friend of his, as he put it.

Q. That that was the scope of his employment, to defend Major Dennis? A. Yes sir.

Q. And did he say to you in that conversation that Major Dennis had been indicted in St. Louis, and he was employed to defend him in that indictment? A. Yes sir.

Q. Is that substantially what occurred there, Mr. Lindsay, between him and you? A. Yes sir, I think it is.

Cross-Examination

By Judge Krum:

Q. There was not anything else you recognized the senator by except the sound of his voice? A. I thought I recognized his voice very clearly.

Redirect Examination

By Col. Dyer:

Q. State whether in that conversation he said anything about having asked the inspector in charge to notify him of any complaints against the company? A. I do not recall that.

Interview in The Kansas City Star.

Saturday, January 23.

What Mr. Burton Says.

Took the Fees, but Contends That he Was Acting Within His Rights.

Washington, Jan. 23.—Telegraphic word was received in Washington to-day that a federal Grand jury had returned an indictment against Senator Burton of Kansas. The

214 Senator said to-day that he took the fee and performed the services indicated in the telegraphic information, but he says the services were privileged, and were not of a kind prohibited by the statutes. The information which has been secured for the consideration of the grand jury by the inspectors of the Postoffice department and the investigators

for the Department of Justice, is that J. R. Burton, while serving in the United States Congress as senator from Kansas, accepted money from Major Hugh C. Dennis of St. Louis to pay him for services rendered in one of the federal departments in Washington.

Senator Burton says he will go at once to St. Louis and defend the case and has no doubt that he will be able to make it perfectly clear that there was no reason for bringing the indictment.

The information given to the grand jury was to the effect that the services rendered for the money paid was formed by going to W. E. Cochran, chief of postoffice inspectors in Washington. It was not represented in the United States Grand Jury that Burton succeeded in performing any services, or that he paid any bribes to any government employees, but that as a congressman he had received money in a case in which the government was interested.

Senator Burton's name became prominent in connection with the famous Rialto case, when the incorporators of this fraudulent grain commission concern were being tried by Judge Adams in St. Louis. This resulted in a fraud order being issued against the concern. The judge at that time said it was one of the most infamous cases that had ever been brought to his attention and he was sorry that his court could go no further. He recommended other action.

Prosecuting Attorney Folk at this time took an interest in the case and had all the facts looked up. These he brought to Washington and brought to the attention of President Roosevelt with the information that a prosecution would involve
United States Senator Burton. The President said that
215 the prosecution should be made no matter whom it involved. He sent him to Attorney General Knox with the direction that the Department of Justice be used in securing the necessary evidence and getting a federal indictment if one was warranted.

The Department of Justice sent the papers to the district attorney, Mr. Deyer, at St. Louis, with instructions that he co-operate with Mr. Folk in securing the testimony and an indictment if necessary.

In securing this testimony the inspectors for the Postoffice department and the investigators for the Department of Justice were used in getting the information for the grand jury. The result is the indictment, which was returned to-day.

Senator Burton received a dispatch this afternoon informing him that the indictment had been brought. He had hardly opened the message and digested its contents when he was asked for a statement for publication. He said:

"I deny in the most emphatic terms that I ever attempted to prevent an issue of a granted order or represented my client in any case pending before the department. Major Dennis had been indicted by the federal grand jury in St. Louis, and I was one of the lawyers who had been employed to defend him. I had gone on one occasion to St. Louis to consult with him and he had come on to Washington to talk to me. When he came to Washington he brought copies of the indictments. As his attorney I went to the Postoffice department and inquired of Mr. Cochran, chief postoffice inspector, whether there was any fraud order cases pending before the department in which Dennis was concerned.

"I stated in as direct language as I could in my conversation with Mr. Cochrane that I could not be employed to represent a client in any case where I would have to oppose the government in any shape, manner or form. But if there were any charges against my client I asked to be informed and requested him to let me know if any charges were subsequently brought.

I am going direct to St. Louis and am ready for trial
216 right at this time. I shall insist upon an immediate trial in full knowledge that I am not guilty of any wrong.

The Rialto Grain and Securities Company of St. Louis was the successor of Brook's Brokerage and Commission Company. In the old concern Charles H. Brook was the principal stockholder, having all but two shares of the $150,000 of stock. In May, 1902, the transfer of stock forming the Rialto Company took place. In this new company Hugh C. Dennis was the principal stockholder, also secretary and treasurer. Another member of the firm was Thomas H. Garland.

It was in the prosecuting of this commission firm for swindling its victims that Judge Adams said the managers should receive severer punishment than being deprived of the use of the mails. This resulted in action against one or more of the incorporators.

While this criminal action was pending Senator Burton came to Washington as the attorney of Hugh C. Dennis. He went to the chief inspector of the postoffice department and demanded the papers in the fraud order cases. He contended that inasmuch as a fraud order had been issued and that there was nothing pending against his client in the postoffice department that he should be allowed to have access to the papers, and in fact, that he should have possession of them. The department refused to give up the papers.

Joseph H. Aubere, a witness of lawful age, produced, sworn and examined on the part of the United States, testified as follows:

Direct Examination

By Col. D. P. Dyer:

Q. State your name in full? A. Joseph H. Aubere.

Q. And your position? A. Newspaper correspondent.

Q. Of what paper? A. The St. Louis Globe Democrat.

Q. Do you know Senator Burton? A. Yes sir.

Q. I will get you to state whether, on the 23d of January of this year you saw the senator after the report of an in-
217 dictment having been found against him? A. I cannot say as to the date, not the specific date. It was on the Saturday in which the indictment became known in Washington.

Q. As such correspondent, by looking at the paper, could you refresh your memory as to the time? A. Yes sir, because it would appear the day of the telegram.

Q. Look at this and state on what date it was you had the talk with him? A. (after examining newspaper clipping): This is January 23.

Q. I will get you to state whether or not at that time a statement was dictated to you by Senator Burton? A. Yes sir.

Q. Did you write it down at that time? A. No sir, I took notes on it.

Q. Did you submit the statement to him? [—] Well in this way, he came to my office to see it, and then I submitted it to him. I did not take it to him.

Q. He came to your office after you had seen him in the first place? A. Later in the same day.

Q. And before your message had got out of Washington to your paper here? A. Yes sir.

Q. Does your independent recollection of that interview enable you, without looking at the interview itself, to tell the exact words that were used in that interview? A. I would not want to.

Judge Krum: We do not see any objection, your honor, to reading this clipping, beginning with "dictated statement".

Col. Dyer: Q. I will ask you to look at that paper and see how much of that interview was submitted to Senator Burton before you sent it off. A. (referring to paper) It was all submitted from the words where I say "This is what he dictated"; that was the beginning of it, and I read to him that night down to the paragraph, which is my own language.

218 Senator Burton Denies Charges and Explains

Special Dispatch to the Globe-Democrat.

Washington, January 23.—It became known about the capitol early in the afternoon that Senator Ralph Burton of Kansas

had been indicted by the grand jury at St. Louis, and the information, imparted through press dispatches, created quite a stir. Senator Burton left the Senate chamber soon after the news came to him by telephone, and went to his office in the Maltby building, just across from the capitol grounds. There he received a number of telegrams and communicated with friends, both here and in the West. To those who saw him the Kansas senator protested his innocence most vehemently. He told them, that nothing could be proved against him and that he was ready to face his accusers. The news did not create as much surprise as might be imagined, as there has been frequent reports connecting his name with "get-rich-quick" concerns in St. Louis a number of times. Senator Burton has been asked about these things and entered general denials, asserting that there was no record and no information which would connect him in any but the most legitimate way with business transactions in the West. That these rumors have shaken the confidence felt by the Senator's colleagues in him is not denied. The afternoon papers here printed meager accounts of the indictment in St. Louis, and in the course of the publications it was asserted that checks had been traced to Senator Burton, signed by H. C. Dennis and W. G. Mahaney, in all amounting to $1400. The assertion was made in the publications that the amounts were paid to him for using his influence in Washington for the right to use the mails for the Rialto Grain and Commission Company. Senator Burton told his friends that it was true he had accepted checks from the men named, but that they were for legitimate expenses. One of these publications was handed to Senator Burton with a request that he make a statement as to the charges it contained, and this is what he dictated:

219 Dictated Statement.

"I was retained as counsel for Mr. Dennis during his trouble in the winter of 1892 and 1893. I became associated with Mr. Harlan, his local attorney, and other St. Louis counsel in a regular way, and upon the recommendation of mutual friends. I talked over the case with local counsel in St. Louis, and later Dennis came on here to Washington, bringing a copy of the indictment which had been found against him in St. Louis. I conferred with him about his case, and afterward went to St. Louis and conferred with his local counsel. While Dennis was here I went with him to the postoffice department and introduced him to Supt. Cochran, chief of the inspection service of the department. I told Mr. Cochran that Dennis had been indicted by the federal grand jury in St. Louis, and that I had examined into the case, and as far as I could see, I did not

believe that there was a case against him. I wanted to know if there had been any complaint entered against Dennis before the department, and I was told that there had not. I then told Mr. Cochran that, although I was Dennis' counsel, I could not be retained to oppose the department in this or any other matter, and would not do so. I told Mr. Cochran, and I believe he will bear me out in the statement, that both Mr. Dennis and his local counsel, Mr. Harlan, had advised me that Dennis proposed no violation of the federal law, nor would he oppose any order or wish of the department. This was done in the presence of Mr. Dennis, my client. I called at the department once or twice after that to inquire if any complaint had been lodged there against Dennis, and on those occasions repeated my previous statement that I was not there to oppose the wish, order or rule of the department in any shape, manner or form, nor to act as an attorney before the department for him. After consulting with local counsel in St. Louis, as already explained, when I was out there during the holidays, we agreed that as Congress was soon to reassemble, it was not necessary for me to remain in St. Louis in the trial of the case before the courts."

220 Defends His Course.

"But how about the passage of money to you, Senator"? was asked.

"The payment that Mr. Dennis made to me was because I was employed as counsel".

"The press reports use the name of Mahaney. What do you know of him?"

"Mahaney was associated with Dennis in business out there. They took hold of a concern which perhaps had not been run right, but I was told that they intended to run it as it should be. Mahaney was with Dennis when he came to Washington to consult me".

"Was there nothing incompatible with your duty as a United States Senator in your being employed as counsel for this company" was asked.

Senator Burton did not dodge the question, but promptly responded: "My acting for Mr. Dennis as an attorney was not incompatible or in conflict in any way with my official duties as a senator. I shall not meet this case on technicalities, but on its merits, and I am satisfied that the court and the officials and everybody will be convinced that I have not only not violated any law, but that I have not been guilty of even an impropriety."

Questions designed to bring out more specific information as to the payment of money to him by Dennis and Mahaney were met with the statement:

"Yes, I received a check for $500.00, and received as much as $1400. That is not all I received, but, of course, that is a matter of my private business, as it was the fee for legal services and I am no cheap lawyer".

Again, later in the evening, Senator Burton gave a statement, in which he said: "I say candidly that while I may not be entirely familiar with the laws governing the conduct of a United States senator, I have never tried, directly or indirectly,
221 to influence any department in any shape in this or any other case since I have been a United States senator. I have not violated any law, nor is it my intention to seek vindication by any technicality".

Coming to St. Louis.

Senator Burton declared his intention of going to St. Louis, and expects to leave here sometime to-morrow afternoon. He said that he intended to talk with friends and would, of course, be guided in part by their advice as to any further statement he might make or any action he might take. He indicated that it was his opinion that "a job" had been put up on him, but he would not make such a charge, as he did not know of such a thing and was not ready to talk of the features of his defense until after he was fully advised as to what the real situation was.

Q. Was there any change or alteration made in it at that time? A. Not by me.

Q. At whose suggestion—at his suggestion? A. Yes, sir.

Q. What alteration was made at that time, and what interlineation was made? A. I cannot tell only from memory, but I have an original copy of this, and if I could look at that I could tell exactly.

Q. You may look at that for the purpose of refreshing your memory. (Witness produces copy of interview). A. In the portion of the interview, what is in the printed part, next to the last sentence in the first paragraph, in about the first 300 words —it is in the next to the last sentence in the first paragraph. That sentence as I wrote it reads this way—

Judge Krum: Q. It is not a part of the dictated statement, is it? A. Yes; that is, the dictated statement was given to me in notes, and this is the way I transcribed my notes on the typewriter; it was taken in that sense.

222 Q. And what time did you first see him that day? A. It was between three and four o'clock in the afternoon.

Q. Then when was the next time you saw him, when this change was made? A. After nine o'clock in the evening.

Q. Show the change that was made at nine o'clock, from the interview he had given at three o'clock, if any?

Judge Krum: What difference does it make?

Mr. Lehman: It is a correction, and not a change.

Judge Krum: The defendant has suggested that they take this paper and read it as an interview.

The Court: Why don't you read the first of the interview and then tell what he did at nine o'clock.

Q. Read the interview, and then tell any change you made. **A.** (Reading).

Burton:

"I was retained as counsel for Mr. Dennis during his trouble in the winter of 1892 and 1893. I became associated with Mr. Harlan his local attorney and other St. Louis counsel in a regular way and upon the recommendation of mutual friends. I talked over the case with local counsel in St. Louis and later Dennis came on here to Washington bringing a copy of the indictment which had been found against him in St. Louis. I conferred with him about his case and afterward went to St. Louis and conferred with his local counsel. While Dennis was here I went with him to the Post Office Department and introduced him to Superintendent Cochran chief of the Inspection service of the department. I told Mr. Cochran that Dennis had been indicted by the Federal Grand Jury in St. Louis and that I had examined into the case and as far as I could see I did not believe there was a case against him. I wanted to know if there had been any complaint entered against Dennis before the department and I was told that there had not. I then told Mr. Cochran that although I was Dennis' counsel I could not be retained to oppose the department in this or any other matter and would not do so. I told Mr. Cochran, and I believe he will bear
223 me out in the statement, that both Mr. Dennis and his local counsel, Mr. Harlan, had advised me that Dennis proposed no violation of the Federal law nor would he oppose any order or wish of the department. This was done in the presence of Mr. Dennis my client. I called at the department once or twice after that to inquire if any complaint had been lodged there against Dennis and on those occasions repeated my previous statement that I was no there to oppose the wish, order (in pencil)
or rule (of the department) in (any) shape, manner or form (in pencil)
(nor to act as an attorney before the department for him).

"After consulting with local counsel in St. Louis, as already explained, when I was out there during the holidays, we agreed that as Congress was soon to reassemble it was not necessary for me to remain in St. Louis in the trial of the case before the courts." The last words are the ones where interlineation was made that evening.

Q. Go ahead and tell what interlin-ation was made that evening? A. (reading) "Nor to act as attorney before the department for him".

Q. You wrote that in that evening? A. Yes sir. (Witness continues reading) "Mahaney was with Dennis when he came to Washington to consult me"; I haven't that here, but I recollect that I had "Mahaney as well as Dennis was with me", and the senator said I was in error, that Mahaney was not with him; so I struck that out. There is a little more that we quoted in there, but I did not read that to him in the evening.

Q. I will get you to state what else was said in that interview, if anything, according to your recollection, that you have not already read? A. Well, I don't remember. When I first went in there we sat talking quite a while with the understanding that our conversation was—

Q. I don't ask you for any private talk with him about the matter, but I ask you whether that interview, as you have read it, embraced substantially what was said by him
224 at that time? A. It embraced all that he dictated to me for me to print.

Q. Embraced all that he authorized you to print? A. Yes, and all I read back to him.

Cross-Examination

By Judge Krum:

Q. Didn't the senator say there were other matters in that connection that he didn't care to discuss then but would discuss them with you later? A. He may have done so, but I do not recall anything but this.

W. E. Cochran recalled on the part of the United States, having been heretofore duly sworn, further testified as follows:

Direct Examination

By Col. D. P. Dyer:

Q. What time in the evening of January 23 was the interview between yourself and Senator Burton at the Maltby Building? A. Shortly after five o'clock in the afternoon.

Cross-Examination

By Judge Krum:

Q. Was anybody present? A. Yes sir.

Q. Do you remember about what time of the day it was when you had this talk on the 5th of February? A. Yes sir.

Q. When was that? A. It was about the same hour, probably half past five o'clock.

Q. Was that in the senator's office? A. Yes sir.

Q. And where was it at that time? A. In the Maltby building.

Q. Is that what is called the Senate Annex? A. Yes, sir.

Q. And in which room? A. I could not tell you.

Q. Was it upstairs, or on the ground floor? A. I think it was on the ground floor.

225 Q. Was anybody present besides yourself and Senator Burton? A. Not when we had that conversation. Col. Smith and a young lady had been there, but they had gone.

Hector C. McRae a witness of lawful age, produced, sworn and examined on the part of the United States, testified as follows:

Direct Examination

By Col. D. P. Dyer:

Q. Your name? A. Hector C. McRae.

Q. Were you at any time connected with the Rialto Grain and Securities Company? A. I was.

Q. State when? A. From October 20, 1902, until July, 1903.

Q. In what capacity were you connected with that company? A. I had charge of the bills and finances; I was comptroller.

Q. Do you know Senator Burton when you see him? A. Yes sir.

Q. When was the first time you ever met him? A. March 26, 1903.

Q. That was the first time you ever met him? A. Yes sir.

Q. Where? A. In the Rialto Grain and Securities Company office.

Q. State what occurred there, according to your recollection? A. I had some business in Mr. Mahaney's office. It was before lunch. I went in there, and Mr. Mahaney was there with Senator Burton; he introduced me to him, and said that the senator had tendered his resignation, that Senator Burton had severed his connection with the company, or words to that effect, and he had paid him up to date; that the senator had felt that he was not earning his fees, in view of the fact that there had been nothing doing for some time past and that everything had been cleaned up in the department; that there were no complaints whatever against

226 the Rialto Grain and Securities Company in the department at Washington. Mr. Mahaney, in introducing him, made most of these remarks.

Q. What you have given here as said by Senator Burton or by Mr. Mahaney was said in the presence of each other? A. Yes sir.

Q. Was that all you recollect about—recollect now, Mr. McRae, as having occurred at that time? A. Well, before leaving, or before breaking up, Senator Burton said he would give, or that he did give Mr. Mahaney his address, and that he was always at hand if the company required him again, and the question of a retaining fee was spoken of; but my memory regarding that is not very strong. I think that was a matter that was to be left, to be taken up later on.

Q. I will ask you to state what was said, if anything was said, by Senator Burton in reference to the matters of the Rialto Grain and Securities Company in the Postoffice department at Washington being wound up?

Judge Krum: We submit he has stated.

Col. Dyer: Q. State fully if there is anything more in the matter? A. He said that before leaving Washington, he had called at the department and there learned that there were no complaints against the Rialto Grain and Securities Company.

Q. Is that all that occurred there, as you now recollect it, sir? A. Yes sir.

Cross-Examination

By Judge Krum:

Q. Mr. McRea, the talking on this occasion was done for the most part by Mr. Mahaney, wasn't it? A. Yes sir.

Q. You say Senator Burton stated that he had been to the department before he left Washington and learned that there were no complaints against the company? A. Yes sir.

Q. You are not aware, are you, that this check which has been read here, and been referred to by the witnesses, shows pretty nearly half a bushel basket of them pending at
227 that time? A. I was not aware of that.

Q. You don't know anything about that? A. No sir.

Counsel for the Government offers a letter, dated January 19, 1903, addressed to Thomas B. Harlan, and signed J. R. Burton in evidence.

Counsel for the Government also offers in evidence the letter dated January 22, 1903, addressed to J. R. Burton, and signed Hugh C. Dennis.

Judge Krum: We object, as not competent upon the general theory of the defense.

The Court: I sustain the objection to this as surplusage as they simply relate to the sending of money, and the checks are in evidence, and there is no use to duplicate that.

Col. Dyer: I submit that in the letter I offer on what is attempted to be made an issue, the statement in the latter part of that letter has [consider] bearing.

Objection sustained.

Col. Dyer: I would like to have the indictment and the return on the indictment of Dennis so as to show when he was indicted and when the case was pending in this court, unless it be admitted that it was returned on the 29th of December.

Judge Krum: If you say that was the date, I will admit it.

The Court: The clerk will get the files, and that can be supplemented later.

Adjourned until Friday, March 25, 1904, at 10:00 o'clock a. m.

228 March 25, 1904, 10:00 o'clock a. m.

Court reconvened, pursuant to the foregoing adjournment.

Col. Dyer: I desire to offer formally the stipulation that was filed in this case. I do not believe it has been offered in the case, but I believe most of the facts stipulated have been referred to in the course of the examination; but lest something may have been omitted, I offer the stipulation.

Judge Krum: I do not understand, if the court please, that a stipulation is a piece of evidence in a case. It is resorted to in case any question arises as to the admissibility of a paper or evidence referred to in the stipulation.

The Court: There might be some facts mentioned in it. There is no harm in offering it, as it has already been twice considered in evidence.

The stipulation referred to was admitted in evidence and is in words and figures as follows to-wit: (See the same set out in full on page 99a)

Col. Dyer: I want to offer in evidence the date of the return to this court of an indictment against Hugh C. Dennis and Thomas B. Garland. The date of the filing is November 24, 1902.

The Court: These are offered in evidence for that purpose?

Col. Dyer: That is all, yes sir.

The endorsement on the back of the indictment referred to was admitted in evidence and is in words and figures as follows:

"No. 4772. United States District Court, Eastern Division, "Eastern District of Missouri. The United States vs. Hugh "C. Dennis and Thomas W. Garland. Indictments for viola-"tion of Sec. 5480. A True Bill. Robert McK. Jones, Fore-"man Grand Jury. Filed Nov. 24, 1902. Wm. Morgan, Clerk."

The Government here rested its case.

229 The defendant moves the Court to require the prosecution to elect upon which counts of the indictment it will farther proceed, and upon such allegation by the prosecution to direct a verdict for the defendant upon the counts abandoned.

As ground of said motion, the defendant shows that the evidence as to a service claimed to have been rendered in a matter in which the United States was interested, is limited to one transaction, and the various counts of the indictment apparently are designed to state the same offense in various ways, and not state separate and distinct offenses of the same kind.

At the close of the Government's case, the defendant asked the following instructions be given to the jury:

The Court directs the jury to return a verdict of not guilty as to count one of the indictment.

The Court directs the jury to return a verdict of not guilty as to count two of the indictment.

The Court directs the jury to return a verdict of not guilty as to count three of the indictment.

The Court directs the jury to return a verdict of not guilty as to count six of the indictment.

The Court directs the jury to return a verdict of not guilty as to count seven of the indictment.

The Court directs the jury to return a verdict of not guilty as to count eight of the indictment.

The Court directs the jury to return a verdict of not guilty as to count nine of the indictment.

Upon the evidence adduced, the court directs the jury to return a verdict of not guilty upon the indictment.

Which instructions were by the Court refused, and the defendant duly excepted at the time.

230 Judge Krum: The case of the Government being all in, the defendant moves the court to require the prosecution to elect upon which counts it will proceed further.

The Court: As far as the first three counts were concerned, they relate to one transaction, namely, the receipt of that sum of money here as it appears on March 26th.

The first count charges that it was received on that day as compensation for services rendered in a matter in which the United States was directly interested.

The next count is the same as the first, with the exception that it charges that the United States was indirectly interested. Now, considering the argument that was made before the court on the demurrer, it might be true that there is some difference in contemplation of the law between the direct interest and the indirect interest which the Government may have in matters pending before a department in the shape of an inquiry which is the subject matter in this case. I have held, and will, and do so state to the jury, that the Government is both directly and indirectly interested and shall submit both of these counts to the Jury so that a verdict may be rendered on either one of them, or both of them, in order that the question may then be passed upon, if counsel desire, on their motion in arrest, or on a demurrer as to whether there is any interest on the part of the United States in this matter, or whether that interest is direct or whether it is indirect. So both of these counts will be left to the jury, with the statement that the Government is directly interested, and indirectly interested, too.

The third count charges that this money was received from particular officers, instead of from the Rialto Grain and Securities Company or anybody representing it. This third count is the same as the first. There is no doubt about that, and there is no particular point in having that count go to the jury, or any verdict on that count. The whole question will be submitted on the first and second counts.

231 As to whether or not there shall be an election so far as the other counts art concerned, the court differs from counsel for defendant in this: That it is not one transaction within the meaning of Section 1782, which is involved in this case.

The gist of the offense, as has been mentioned by both counsel —and the court fully agrees with them—is the receipt of money; the receipt of compensation, the receipt of $500 at one time for services, if they were rendered, before the Post Office department, would constitute an offense in and of itself; so the receipt of another $500 would be an offense in and of itself. That is the view I take of it.

The motion to elect will be denied, with the understanding that so far as the third count is concerned, there should not be any verdict on that if there is a verdict on the other counts. That I will take care of later in the case.

Thereupon the defendant duly excepted at the time to this ruling of the court.

Judge Krum: Then the view of the court is that the counts which cover the receipt of checks, and the proceeds of these checks, state separate and distinct offenses?

The Court: Yes, I think so.

Whereupon the defendant, to maintain the issues upon his part, introduced the following evidence:

Thomas B. Harlan, a witness of lawful age, produced, sworn and examined on the part of the defendant, testified as follows:

Direct Examination

By Judge Chester Krum:

Q. What is your name? A. Thomas B. Harlan.

Q. What is your occupation? A. I practice law in the city of St. Louis.

Q. How long have you been a member of the bar here in St. Louis? A. Since October, 1892.

Q. Do you know the defendant, Senator Burton? A. 232 I do.

Q. When did you meet him for the first time? A. On the 17th of November, 1902.

Q. And where? A. I met him—he was in a carriage in front of the Rialto Building on 4th and Olive Streets in the City of St. Louis. I was introduced to him and got in the carriage.

Q. At that time had the Rialto Grain and Securities Company been organized? A. Yes, sir.

Q. Did you have anything to do with the organization of that company? A. Yes sir, I was consulted as to the legal phases pertaining to that matter and organized that company, consulting with you in the mean time.

Q. Who prepared the articles of association? A. They were prepared by me.

Q. What was the capitalization of the company? A. $25,000.

Q. Was that capital actually paid in, to your knowledge? A. It was, yes sir.

Col. Dyer: Before going into this matter—I do not want to ask about the company; I do not understand that I am here trying the Rialto Grain and Securities Company. I desire to say that this testimony where reference is made to the amount of the capitalization and as to whetner it was actually paid in or not is a matter immaterial to any issue in this case, and therefore I object to going into the history of the Rialto Grain and Securities Company. I do that lest I might, if I sat still, be put in the attitude of—if it was permitted and allowed with-

out objection—of being cut off in the end as to my inquiry as to the actual business carried on by that company. I interpose the objection now, to the end that I may know how far the Government may go back to show the real business of this concern and the purposes of the organization.

233 Judge Krum: The Government, if the court please, is at liberty and has been at liberty at any stage of this case, and at any time, as far as this defendant is concerned, or Major Dennis or Mr. Harlan, or anyone connected with the Rialto Grain and Securities Company, down to the time when Senator Burton's connection with the company ceased, to have the full exposition, if it is necessary, of the affairs of that concern. There never has been the slightest effort or intention to avoid any such inquiry. On the contrary, it has been invited.

Now, I do not propose to go into the details of the business of the Rialto Company, but I respectfully submit it is material in this case to show that from the very outset the corporation itself was not a myth; that what was called a corporation was actually a corporation. That is as far as I desire to go.

The Court: Of course it is understood and must be understood that it is immaterial for the purposes of this case, whether this company was in point of fact fraudulently conducting its business. The only thing necessary to know is that there was an inquiry pending in the department. Of course I cannot anticipate what the purposes of the defense is in asking a question.

Judge Krum: Q. Who, if you know, Mr. Harlan, at the time of Senator Burton's employment by the company, was its principal stockholder? A. Hugh C. Dennis.

Q. The gentleman who has been referred to here as Major Dennis? A. Yes sir, the same.

Q. What was his official relation, if any, with the company? A. He was president of the company.

Q. Do you know what his occupation was at the time when he organized this company? A. Well, at that time he had been connected with the Brooks Brokerage Commission Company for a brief period and was also the general agent
234 for the Hartford Life Insurance company, having, I think, the agency of three states at that time, Missouri, Kansas and Arkansas.

Q. He was connected with the Brooks Brokerage company? A. For a brief period, yes sir.

Q. When did that connection begin? A. That began sometime in June, 1902.

Q. And when did his connection with that company cease? A. Well, the affairs of that company were wound up in the early part of September, 1902.

Q. I will get you to state whether the organization of the Rialto Grain and Securities company was had for the purpose of merely transferring the business of the Brooks Brokerage company to a new concern, or whether it was organized upon an altogether independent basis as an original institution itself? A. It was organized upon an independent basis as an original institution, with great care, that the Brooks Brokerage company would not get mixed in with it.

Q. Were you in any relation yourself to the Rialto Grain and Securities company at the time when you met Mr. Burton? A. Yes sir, I was one of its counsel.

Q. Was it in that capacity that you were introduced to him and met him? A. Yes sir.

Q. What authorization, if any, did you have from Major Dennis, to act for this company, in meeting Senator Burton. A. Major Dennis had indicated to me that he wished to employ Senator Burton and asked me to meet him. That occurred about thirty minutes before I met Senator Burton, and, as I say, in about thirty minutes after that, Major Dennis came to me, I being then on the third floor of the Rialto Building, and asked me to come and meet Senator Burton, and ride to the Union Station with him, as he could not go, that is, that he, Dennis—

235 Q. That is that he, Dennis, could not go? A. Yes sir, that Dennis couldn't go. That is the method of how I happened to meet Senator Burton. We went downstairs.

Q. Did you go to the station with him? A. Yes sir, I got in the carriage with him, and Mr. Ernest Kastro was in the carriage with Senator Burton, and we drove to the Union Station. But in that brief time I had no opportunity to approach the questions that I desired to speak to him about, this matter of employing him as associate counsel, so I suggested I would go on to Chicago. We contemplated catching the Illinois Central train, but we missed that and took the Chicago and Alton midday train that left here at that time at about 10 minutes past 12. And I was with Senator Burton and Mr. Kastor from the time I got in the carriage on the train to Chicago, and at the Auditorium Annex, the hotel in Chicago, until about half past nine that evening, during which time we had all those conversations.

Judge Krum: Perhaps it would save time, your honor, if I asked Mr. Harlan to indicate, without specific questions from me, just what occurred on the journey to Chicago and in Chicago, if there was any conference there, with reference to this matter of employment.

The Court: You may take that course.

Q. I will, therefore, ask you, Mr. Harlan, to state to the jury all that occurred between Senator Burton and yourself, with reference to the matter of his employment by the Rialto Grain and Securities Company? A. As near as I can remember.

Q. Yes, just give us your best memory. A. Well, after we got on the train, we—

The Court: Q. You say this was November 18?

A. This was November 17th. We got on the train and after a few preliminaries, trying to get acquainted—I had
236 never met Senator Burton—we went into the dining car for lunch and while we were eating lunch, Senator Burton and I sitting on one side of the table, facing the locomotive and Mr. Kastor on the opposite side of the table, I broached the subject of his employment as counsel for the Rialto Grain and Securities Company. Now, I am not able to recall every detail, but I remember very distinctly going over with him in minute detail and at great length the controversy between Charles H. Brooks and Hugh C. Dennis growing out of the affairs of the Brooks Brokerage and Commission company. I explained to him how the Brooks company had been organized by a man of the name of Brooks, and conducted by a man of the name of Brooks, and how he, Dennis, had inadvertently fought Brooks interest, Brooks' trip to California, and his telegram back to Dennis, Brooks' return here with a lawyer, his employing two additional lawyers here in St. Louis, the great amount of litigation that had resulted from that—there had been 15 civil suits, something like 20 libel suits, one injunction, a service or something like—a notice under the special statute, of something like more than 200 other cases that might be brought; but which, on this particular date we had about cleaned up that situation. But as a result of this controversy, the matter, through Brooks in his fight on Dennis, had taken the papers procured by him, through, as I explained to Senator Burton, as false, or, if you will permit the term, a fake collection agency; and that he had turned those papers over to the post office department here and brought about an investigation of the affairs of the Brooks Brokerage and commission company, and on this date, the 17th day of November, that investigation had been, I think concluded, or about concluded. It extended over a considerable time, probably four weeks, this investigation—not every day, but working at it from time to time, during which period I had represented the interests of Major Dennis, and had always worked as his representative with the post office inspectors, with a view of seeing
237 that all information that they desired should be furnished and given to them; that being the explicit direc-

tion I had had from Maj. Dennis that everything should be turned over to the Post Office inspectors.

So we went over that at great length. It was apparent at that time—

Col. Dyer: State what was said, not what was apparent.

A. Well, I made this clear to Senator Burton that at that time there would be indictments, but there still remained the hope at that time that the indictments would be directed against Brocks and Walden, whom I considered the real guilty parties and that the Government would probably select Maj. Dennis as the prosecuting witness, we believing that one of the three would have to be selected.

That was the matter uppermost in my mind at that time, and I explained that to Senator Burton, as I say, in great detail so he might understand the controversy and the questions involved, just as I understood them.

Well, of course, going along, necessarily the conversation was punctured more or less with general subjects. I remember then we got to talking about railroads. The dishes had been cleared off, and I got to talking about the railroad situation in the west, I being interested in one railroad enterprise, and Senator Burton in another, and we drew maps on this table cloth indicating these different localities. That led me to explain to Senator Burton a phase of the Rialto Grain and Securities company which was then contemplated and had been carried pretty far; that is, a department to deal in what we term "promotion securities", and I used this railroad situation to illustrate that to Senator Burton in this way—I will tell it to you just as I did to him: Here is a railroad (indicating); Now, a trust company will underwrite bonds, but the difficulty with the trust company is in selling those bonds. The

238 Rialto Grain and Securities company had one of the best distributing plant that probably ever was established—this was all explained to Senator Burton—whereby they could get out 30,000 letters a day. They had, at great expense procured lists of investors, and this securities department contemplated being with the trust companies, on the one hand, soliciting these bonds that they would have for sale, and through this distributing department placed those securities before selected investors at the rate of 30,000 a day. This was a matter in which I felt a keen personal interest. It seems to me something that was needed, and, as far as I am concerned, I still have confidence in it. It interested Senator Burton very much. Using this railroad situation to explain it, and how it would apply to the railroads with which he and I were respectively interested. So that was explained to him.

I also explained to Senator Burton in that connection that it was then contemplated, the matter had then been talked over, to employ some one to represent the Rialto Grain and Securities in the east, preferably a lawyer, someone who could deal with the trust companies there, and indicated to him that in the event of his becoming counsel for the company, that he would probably be called upon, and in fact, would be called upon, to look after that feature of the business.

Well, after that matter had been gone over pretty thoroughly, and while we were still sitting at the table, and after I had explained—well, yes, I also entered into quite an elaborate explanation of the organization of the Rialto Grain and Securities company, its plan, as it differed from the Brooks Brokerage and Commission company, and that led to the discussion of the laws, state and federal applicable to the grain business, whether on the board of trade or off the board of trade, the legal questions are just the same. I went over the provisions of the state laws at that time, and that led to some considerable question and argument between us; at that time, by reason of this postoffice investigation, I was quite familiar
with the provisions of the federal law prohibiting the
239 use of the mails under certain circumstances, and the
adjudged cases under that statute. So I pointed out to Senator Burton just how the Rialto Grain and Securities company, under the plan they were operating and which we had advised they might safely use, would keep within the state law and the federal law. And I remember he asked me distinctly in that connection "how are you going to keep within the federal law". I answered "Simply by preventing any misrepresentation", and then I explained to him that in order there might never arise any difficulty in that respect, it was the practice of the Rialto Grain and Securities Company, and one of my duties as its counsel, to examine all of its advertising matter before it was sent out through the mail. A rule that was then faithfully observed, and always was observed to the best of my knowledge, certainly until after Mr. Burton ceased to be connected with the company. Well, that led to some considerable discussion about the law and the facts, which, however, Senator Burton took a position against me for the purpose of bringing out the points; but I satisfied him thoroughly that as long as this company followed my advice they never would have any trouble with the postal authorities, and they never did.

While we were still sitting at the table, and in that connection, though probably not immediately following—as I say, there were general matters coming in all the time, general conversation, a running conversation,—but Senator Burton

made this statement: He said "Now you must remember I am a United States senator", and with a degree of severity, he said "I am not going to do anything inconsistent with my duty as a United States senator",—and I thought more of him for stating it just that way.

Col. Dyer: You need not mind about your admiration.

A. Excuse me, Colonel. —I assured him I didn't want him, under any circumstances to do anything inconsistent with his position as United States senator, and I was just as
240 positive in my statement as he was in his declaration, as far as that matter was concerned.

Well, we went back into the smoking car. Up to this time nothing had been said about compensation. He had not even indicated, to the best of my recollection, a willingness—or indicated whether he would or would not become counsel. But we went back into the smoking car—just the three of us, there was no one else in the car. I brought up the question of compensation. I explained to Senator Burton that I did not feel that I had any authority to close any contract, but I would take the whole thing into consideration and report it back to the company when I returned to St. Louis. Well, after some playful points, Senator Burton said he would serve as counsel for $500 a month. That struck me as being reasonable, so much so that I did not dissent to it, all things considered. So it kind of drew off again, and then came back to that question. And he said "Of course I don't want to get cut off at the end of one month. For instance—Now, I am using his language as near as I can—"I don't want to go down there to St. Louis and try, or help you in the trial of that case, should there be an indictment, and have my salary cut off at the end of that month". So one or other of us, I don't remember which one of us, suggested five months. At any rate, whoever suggested it, that was acceptable.

Q. What, if any arrangement was made as to the times of payment; were they to be made in advance or at the close of the month? A. They were to be made in advance. The payments were all to be made in advance.

Q. Go on. A. Well, that is the general outline of the matter. By that time, we had about gotten to Chicago and we went into the hotel and spent the evening more socially than anything else.

Q. Was there any variation or change in the proposition and arrangement after you got to Chicago? A. No sir.
241 Q. You have now given us substantially the basis of the employment of Senator Burton as proposed by you and himself, have you? A. Yes sir.

Q. On your return to St. Louis, was the proposition submitted to Maj. Dennis? A. Yes sir. I returned to St. Louis that night, arriving here that morning. The previous day, on the 17th, Maj. Dennis had met with an automobile accident, and I did not see him until late in the afternoon of that day.

Q. But you did see him and submit that proposition to him? A. In a general way. I did not go into details.

Q. Was it accepted? A. He said "go ahead".

Q. Did you thereupon notify Senator Burton? A. I did.

Q. The letter is in evidence here in which you so informed him? A. Yes sir.

Q. Now, under what general designation was Senator Burton employed? A. Simply as counsel.

Q. Was anything said more particularly than you have indicated with reference to the postoffice department of the United States, or any of the departments of the United States? A. Well, I am just trying to recall. In this matter, where Senator Burton had asked me how I proposed to avoid any trouble with the federal authorities, and I explained to him about the statements, it seems the statements were always true—in that connection I did so explain to Senator Burton that the Post Office department had a standing invitation at all times to investigate this business.

Q. That is the Rialto Grain and Securities Company? A. Yes sir, the Rialto Grain and Securities company business; and that we would not only comply, or endeavor to comply with the statutory law on the subject, but also any ruling that might be made by the department.

242 Q. What I want to get at is this: Whether in this employment proposed to Senator Burton, was anything included as to services to be rendered in any departments of the United States government? A. There was nothing said about that specifically.

Q. On the other hand, wasn't that excluded, rather than included. It was not included at all, was it? A. I have given you his statement in regard to his position as United States senator, and as far as exclusive language goes, I do not remember. I do not want to say one way or the other. But I remember that very distinctly.

Q. What I want to get at is, was there any employment of him proposed to or accepted by him, in the department or any of the departments? A. No sir. The truth of the matter is, as I made it plain to him, I did not care anything about the Post Office department, as far as what they might or might not do.

Q. You mean by that you were not aware of the necessity of the employment of anybody in reference to the Post Office department? A. There absolutely was no necessity.

Q. Did you have anything to do with the sending to Senator Burton of a check in the month of November? A. Yes sir, I sent him his first check that is, I enclosed it in a letter I wrote, the check having been made out in the regular way.

Q. For what, and by reason of what was that sent? A. That was sent him in pursuance of this arrangement that I had made with him, that he should get $500 a month.

Q. There is a letter in evidence here of Nov. 20, 1902, addressed to you by Senator Burton, which concludes with this sentence; "In return, if agreeable, you may make remittance for my first months' pay." I will get you to state to the jury whether the remittance was made, was made by reason of that request, or by reason of the contract which had been made between the company and the senator? A. This re-

243 mittance was made in pursuance of the arrangement I had made with Senator Burton.

Q. I show you a letter, dated St. Louis, Nov. 22, 1902, purporting to be signed by you, and addressed to Senator Burton. Is that the letter you sent him? A. Yes sir, that is mine.

Judge Krum: I ask to read this letter in this connection.

Col. Dyer: This is no objection.

Counsel for defendant here read the letter, dated St. Louis Nov. 22, 1902, addressed to J. R. Burton, signed Thomas B. Harlan, which letter is in words and figures as follows:

Nov. 22, 1902.

Hon. J. R. Burton,
c/o Senate Chamber,
Washington, D. C.

My Dear Sir:—We have your favor of recent date, and contents noted. The claims that you referred to against the Rialto Grain & Securities Company, have been investigated by a Post Office Inspector connected with this Department, and he found the actions of our company to be all right, and, we are informed, made a report in favor of our Company relative to the same.

I now contemplate leaving here Monday night for Washington, and should, in due course, arrive there on Wednesday morning, and sometime during Wednesday will take the liberty of calling upon you if convenient to you.

Everything is running very nicely here, but as I hope to see you within a few days, I will wait until then to explain some matters that have come up since my last communication.

I enclose the Company's check for $500, as per agreement. This check should have been sent in my former communication, but I neglected to do so.

Hoping that I shall have the pleasure of a personal interview at an early date, I remain,

T. B. H. Yours very truly,

E. E. THOS. B. HARLAN.

Judge Krum: Q. The former communication to which referred, Mr. Harlan, in this letter, was the letter read in evidence here of November 18, 1902, wasn't it? A. Yes sir.

Q. Now, in that letter you say to the Senator "I don't know what reports have been sent to the Post Office at Wash-
244 ington, nor am I prepared to say that the Government intends to make a case against Major Dennis; but if you can find it convenient to inquire of these facts at the department, you will be able to perform for us a great service at this time". I will get you to state to the jury to what matter you have reference in that communication to Senator Burton? A. This whole letter pertains to—

Q. Directing your attention to this particular part of the letter, state to the jury to what that part of it had reference. A. That had reference to the Brooks matter.

Q. Did it have any reference, or was it intended by you to have any reference to any of the affairs of the Rialto company? A. None whatever.

Q. In response to that letter you received the letter of Senator Burton's of the 20th of November? A. Yes sir.

Q. Which indicates that two complaints had been lodged against the Rialto Grain and Securities Company? A. Yes sir.

Q. Now, at the time Senator Burton was employed by the Rialto Company, did you yourself know of these complaints which had been lodged against the Rialto Grain and Securities Company? A. Well, I am unable to say positively, whether I had or had not, Judge.

Q. When did you learn that they had been investigated here by the Inspector? A. Well, I learned of it the same day that the inspector paid a visit to the company's office.

Q. When was that? A. My impression was that that was later in the year, along in December, but I notice that the letter was referred to in my letter of the 22nd of November, so I am not able to fix the date further than to refer you to that letter of the 22nd.

Q. Who was the inspector? A. I was told that Mr. Price was down there.

Q. Did you see Mr. Price there yourself at that time?
245 A. No sir, I did not.

Q. Did you yourself go to Washington? A. Yes sir, I went to Washington.

Q. When was that? A. My recollection is I left here on the night of the 22nd of November. I am sure of that. I

think that was on Monday, and I got to Washington on Wednesday and got back here on Saturday night the 29th, on which day the capias had been served on Dennis and Garland.

Q. That is, at the time you left for Washington, Dennis and Garland had been indicted? A. No sir, not when I left for Washington; the day I returned they had been arrested, is my recollection.

Q. At the time you left for Washington they had not been indicted, as far as you knew? A. Not that I knew of.

Q. What was your purpose in going to Washington as far as Senator Burton was concerned? A. I went to Washington to see Senator Burton; he was counsel in this matter and I wanted to consult with him with the view of seeing whether he could suggest anything as a lawyer that we might or could do to prevent the indictment of Maj. Dennis.

Q. With reference to the Brooks Brokerage Company? A. That was all in reference to the Brooks Company.

Q. Did you take anything with you for the purposes of information for Senator Burton? A. Well, no, there was nothing to take.

Q. Did you confer with him in Washington in regard to the situation? A. I did.

Q. Now, on your return, you found, as I understood you, that Maj. Dennis and Mr. Garland, had been indicted? A. Yes sir.

Q. Was Senator Burton advised of that? A. He was.

Q. That indictment was returned on the 24th of November? You returned here when? A. On the 29th.

Q. When, if you remember, was Senator Burton here
246 after the indictment? A. Senator Burton was here after that indictment, I think on the 24th of December, Christmas eve, was my recollection.

Q. Was there any conference had with him in regard to the indictments here in St. Louis? A. Yes sir, there was.

Q. Where was that held? A. We held a conference at the office of the Rialto Grain and Securities company. Present, yourself, Senator Burton myself and Mr. Mahaney. And that conference lasted for probably three hours, and every phase of that case was carefully gone over.

Q. Mr. Mahaney has stated here that at that conference it was suggested that Senator Burton had better not appear in the case in this court, lest he might antagonize Mr. Dice. Was any such thing as that suggested by anybody? A. No, sir, I cannot imagine where Mr. Mahaney ever got such an impression.

Q. Did it occur, as a matter of fact? A. No sir, it never occurred.

Q. What, if you can recall, was the suggestion made with reference to Senator Burton's actual appearance in the case here? A. I contended that Senator Burton should appear. But you suggested that it would be a mistake to weight that case down with counsel, and I accepted your position in that matter, and it was concluded that Senator Burton would not appear.

Q. Was the indictment in all of its phases, and all of the facts that were assumed and known to be at the command of the government, considered and discussed at that conference? A. Fully.

Q. And as far as the Senator's actual appearance in the case was concerned, the result was reached, that you have indicated? A. Yes sir.

Q. Now, in the month of December, the payment which was made to Senator Burton you had nothing to do with,
247 had you? A. No sir.

Q. That was made by Major Dennis in Washington; what have you to do if anything with the payment that was made in January? A. Well, I discovered, along about, oh, sometime after the 15th of January, that Senator Burton's check had not been sent to him, and I called Major Dennis' attention to the fact. I was later informed that the check had been sent.

Q. Who directed the sending of that check? A. Well, as I say, I called attention to the fact that it had not been sent, and my understanding was that Maj. Dennis sent it.

Q. State to the jury, Mr. Harlan, why that check was sent to Senator Burton? Whether it was sent by reason of any service he had theretofore rendered in the department, or by reason of the contract which had been made with him. A. By reason of the contract.

Q. When Major Dennis went to Washington in the month of December, did he take anything with him in reference to the case which had been brought against him? A. Yes, Maj. Dennis informed me he wanted to go to Washington and consult with Senator Burton about his case; and at his request I prepared a statement of the facts and brief of the law, and Maj. Dennis took that and a copy of the indictment with him.

Q. Now, in the month of February a payment was made Senator Burton, did you have anything to do with that? A. I don't remember having anything to do with that.

Q. Did you have any knowledge at the time the payment was made to Senator Burton in St. Louis, in March? A. No sir. I did not know anything about that at the time.

Q. Take all those payments that were made; I will get you to state to the jury whether those were made by reason of

service, or services, which the senator had rendered in the department, or whether they were made by reason of the
248 contract which had been entered into by you for the company and himself? A. All made in pursuance of the contract.

Q. As I understand you, the terms of that contract were that these payments were to be made in advance? A. Yes sir.

Q. Coming back to the original contract with Senator Burton, I will get you to state to the jury whether the grain dealing part of the business of the company was gone into at all by way of explanation? A. Yes sir, it was. That was explained quite extensively, and it should be borne in mind in that connection that the Rialto Grain and Securities company was organized in September, and there had been no option period which expired up to that time. The first option ever dealt in by the Rialto Company was a December option. I talked with Senator Burton at this time in November, so those matters were all explained to him.

Q. To your knowledge, had the company at that time, made any arrangement with reference to handling grain? A. That had been talked over and about; the plans were under way for that, the idea being to buy a certain amount of cash grain, even contemplating putting in some elevators in the state, and probably going in to Kansas, the plan contemplated, so there would always be grain on hand for delivery.

Q. Had, in point of fact, any elevators at that time been secured? A. I don't remember as to that at all, Judge Krum. I don't remember any statement like that.

Q. When did Mai. Dennis leave St. Louis after his trial? A. He was acquitted, as I remember, on the 14th day of January, the 14th or the 16th—well, let me see—

The Court: Q. You were asked when he left for California? A. I was trying to recall about the date. It must have been about the 7th of Feb.

[Q.] Answer the questions. Do not precede it with discus-
sion.

249 Judge Krum: How long did he remain absent from St. Louis? A. He returned here on the 25th day of July, 1902.

Q. What was his condition when he left St. Louis? A. He had a total lapse of mind, apparently.

Q. Where did he go? A. They took him to California.

Q. Did you see him there? A. I saw him there the latter part of April, 1902.

Q. What was his condition at that time? A. He was recovering at that time.

Q. And returned here in July? A. Yes sir.

Q. On his return, did he resume his conduct of the company? A. On his return he did, yes sir.

Q. What did you do, Mr. Harlan, with the letters which you received from Senator Burton and which were in your possession at the time of the finding of this indictment against him? A. I turned them over to the government.

Q. When did you do that? A. I could not tell you the exact date. It was sometime after the return of the indictment, but I do not remember the exact date.

Q. Had you retained possession of them all the time down to the time when you turned them over to the government? A. Well, I believe I handed them to you to look at, you had them for a few days, and handed them back to me and I turned them over to the government.

Q. How did you come to turn them over to Col. Dyer? A. He requested them.

Q. At the time that request was made of you, in whose possession were they? A. They were in your possession.

Q. And on your application to me, I turned them over to you, and you turned them over to Col. Dyer, that is a fact? A. I believe, actually Col. Dyer spoke to me and you were coming up here, and he spoke to you and I went back to your office and you handed them to me and I brought them up here
250 to Col. Dyer.

Q. You were subpoenaed as a witness on behalf of the government? A. Yes sir, I was subpoenaed on behalf of the government.

Cross-Examination

By Col. Dyer:

Q. You were also a witness before the grand jury? A. Yes sir, that is, after the indictment.

Q. And before that grand jury these letters you referred to as having been given to me, were produced by you before the grand jury, or your attention was called to them before the grand jury? A. Yes sir, and I believe actually handed them to you in the grand jury room. That is my best recollection.

Q. Before bringing these letters to me, you had turned them over to Judge Krum? A. Judge Krum had them in his possession, yes sir.

Q. And with them were some other letters, weren't they? A. Not when they were turned over to Judge Krum. These letters you had are the same letters Judge Krum had at the time.

Q. Weren't there any other letters that you had in your possession from the defendant, that were delivered up to him by you, after the request for the production of these letters? A. Well, I had two or three letters that I had pertaining to a

personal matter between Senator Burton and me, which I delivered to him. But I do not think, colonel, that was after the request for them.

Q. What I want to know of you is, as to whether or not when you were requested to produce all the letters, you had before that time, at the defendant's request, delivered to him certain other letters that had been written to you by him? A. Before you made the request, I am pretty sure that was, but I

I don't remember whether there were two or three of

251 those letters returned to Senator Burton.

Q. After you were before the grand jury, did you ask Senator Burton to let you have back those letters that you had previously delivered to him? A. Yes sir, I told him that you wanted them.

Q. What did he say he had done with them? A. He said he had destroyed them.

Q. You never saw Senator Burton to know him until you met him on the 17th of November, on the sidewalk in front of the Rialto Building, had you? A. I never knew him before.

Q. Did you know at that time of the contemplated employment of Senator Burton? A. I knew from the very brief conversation I had with Major Dennis, that he desired to employ him.

Q. How long before you saw Senator Burton had Maj. Dennis told you he wanted to employ Senator Burton? A. Well, in a conversation previous to this day, some few days before, he told me he had an opportunity of employing a lawyer who was a United States senator, to be associated with Judge Krum and me, without mentioning any name on that occasion. I said all right. The next time it was mentioned, in which he mentioned Senator Burton's name, was on this 17th day of November, possibly thirty minutes before I met Senator Burton.

Q. Now, do you know how it was, and who brought it about, if it was brought about, the employment of Senator Burton. At whose suggestion was it made, if you know, by Maj. Dennis? A. I only know that from hearsay, if you want me to tell that.

Q. I want to know about the business of this company and I want to know how long before this interview you had with Senator Burton, the matter had been brought to your attention, and by whom? A. Of employing?

252 Q. —Senator Burton? A. I have given you just exactly what had occurred. It may have been three or four days or a week.

Q. Had you had any conversation with Mr. Kastor about that matter? A. None whatever.

Q. Did you learn from Mr. Kastor in that conversation you had in the carriage, with Senator Burton and Major Dennis, that Mr. Kastor had recommended the employment of Burton? A. I think Kastor told me that. I know I got that impression some way.

Q. How was it that Kastor happened to go along to Chicago with you? A. I will never be able to tell further than that he was there in the carriage.

Q. Was there any business between Burton and yourself that necessitated the presence of Kastor? A. None whatever.

Q. Did you know of any reason why Kastor went along with you and Burton that day? A. No sir.

Q. Was there anything said in that conversation between here and Chicago by Kastor, to you or Burton that Burton was acquainted with the proceedings before the Post Office department, by reason of his having connection with the Weltmer case? Was there anything said about that? A. I do not recall a single word about that Weltmer case. No sir, I do not even recall, that I had any knowledge of the Weltmer case at that time.

Q. When you were talking about this underwriting business and making the drawings of railroads and things of that sort on the table in the dining car, you said to Burton after explaining this addendum that was to be attached to this Rialto Company, that you would put such a thing in communication with thirty thousand people a day by mail, is
253 that true? A. That was the capacity of the distributing plant that the Rialto Grain and Security Company was then operating.

Q. When you talk about distributing plant, do you mean to include in the distributing plant the names of persons all over the United States whose names were had there at that office? Do you mean that; what did you mean by distributing plant? A. I mean he had a plant there capable of getting out and mailing 30,000 letters a day, necessarily to be addressed to separate persons.

Q. And did you tell him at the time that you had not only this plant that could write 30,000 letters a day and get out 30,000 letters a day, but he had a record of the names of persons all over the United States, to whom such letters might be addrseed? A. I think I did, yes, Colonel; certainly that would be natural.

Q. Now, I will get you to state whether this plant and this vast number of names that you mentioned to Burton in that connnection, whether those names had been secured partly through the Brooks Brokerage and Commission company, and

that that was a part of the assets of the Brooks company? A. I absolutely have no knowledge on that subject, even now.

Q. This conversation was had with Senator Burton on the 17th of November? A. Yes sir.

Q. This company was organized in the first days of September, this Rialto company? A. Yes sir.

Q. And you had been connected as Attorney for Dennis while he was conducting Brooks company hadn't you? A. Yes sir.

Q. So that you knew not only the business of the Rialto company, but you also knew the business of the Brooks company by reason of your connection with that? A. I knew it in a general way, Colonel.

254 Q. Did you know it so as to be able to tell the jury now whether this number of names of persons scattered all over the country were names that had been gathered by the Brooks Company, as well as additional names gathered by the Rialto Company? A. No sir, I do not. My advice to those people was, when the Rialto company was organized, not to permit one single asset in any shape, manner or form of the Brooks company to go into it. Now, I don't know whether they did or not.

Q. Well, then, how did you know when you told Senator Burton that this Rialto Grain and Securties company had a plant that could get out thirty-thousand letters a day, and had a list of individuals, to whom each of these letters might be addressed? A. I knew that from the statements made by different persons in the office.

Q. And did you question the statements made by the different persons in the office, that these lists had been made up during the administration of the Brooks company? A. I never heard a statement one way or the other on that.

Q. You say that in that conversation you told Senator Burton that you did not want to violate any laws of the United States; is that so? A. I made that perfectly plain to him, yes sir.

Q. And you told him that as to the literature that was being sent out by that brokerage company, over which the post office department might have control, that you would see to it that that literature was submitted to you before it was sent out? A. No sir, I didn't put it quite that way, colonel.

Q. How did you put it? A. I told him it was the policy of the company to submit that stuff to me. And a part of my duty as its counsel to examine it before it was sent out.

Q. Under your terms of his being counsel, without regard to the terms of the so-called contract that was made, did you feel authorized to call upon Senator Burton by reason
255 of his employment, to go to the post office department

and ask whether post office inspectors had been sent here, or whether any complaints were pending in the post office department against the Rialto company. Did you feel, under your understanding with Senator Burton, that you had a right to command his services in that regard, if you desired? A. Well, now, just let me answer the question fully. If a situation of that kind had arose, I have no doubt I would have called upon him, but I always treated Senator Burton in this way, that he would determine what he would and what he would not do.

Q. Certainly; but if you wanted the information as to whether a post office inspector had been sent out here to investigate the business of the Rialto company, you thought you had a right to ask Senator Burton to ascertain that fact for you, but to leave it to Senator Burton's own judgment as to whether or not he should make the request. A. If such a situation had arisen, I think just that situation would.

Q. If there were complaints lodged against the Rialto Grain and Securities company, under his terms of employment, under this employment you made of him, did you feel that you had a right to call upon him at Washington to go to the department and learn there whether complaints had been filed and the nature of such complaints, leaving it to his judgment as to whether he was to overstep the bounds of a senator or not? A. Well, now, just leave out this one expression—whether I thought I had a right to do it—I probably would have done it.

Q. You did do it, didn't you?

Judge Krum: You are asked whether you considered he was bound to respond, and you had a right to call upon him.

Col. Dyer: I am asking him about his understanding.

A. My understanding is expressed.

256 Mr. Lehmann: I submit the witness is entitled to answer the question fully.

The Court: I think counsel should let the cross examination go on, and let the witness answer fully.

Q. (Question read.) A. Now, it seems to me I can best answer that question by saying that if such a condition had arisen, I would undoubtedly have addressed an inquiry to Senator Burton, leaving it to him whether he would act upon it or not. I always regarded him as a senator, Col. Dyer, and I have respect for him as such.

Q. There is not any question about that. But I want to ask you whether or not in this conversation between here and Chicago with Senator Burton, in speaking about the business

of the Rialto Grain and Securities company, didn't he say to you this: "Then, if asked at the department, I am safe in saying that it is the purpose of the Rialto Grain and Securities company to comply with every rule and order of the department"? A. Yes sir, you are correct in that.

Q. What gave rise to this inquiry made of you by Senator Burton, that if he went to the department he was safe in saying so and so, and so and so? A. That I intended to include in my other examination, but I was cut off. That came along in connection with this discussion which grew out of my explanation of the operations of this company relative to 5480.

Q. That is in reference to the violation of the postal laws? A. Yes sir, in reference to the violation of the postal laws, section 5480. Now, it was in that connection. I am not able to connect one explanation directly with it, but it was in that, and I remember that very distinctly.

Q. You have said something about the conversation that took place at the time that Senator Burton was out here, that Mr. Mahaney referred to yesterday? A. A conference we had there on Christmas eve.

257 Q. You have stated in answer to a question put by Judge Krum as to what occurred at that interview and the reason why Senator Burton did not appear in the Dennis case; and you have stated that it was upon the suggestion of Judge Krum that it was not well to overload the case with lawyers, and it was not much of a fight anyhow. Substantially that was about it? A. I don't believe there was anything said about it being not much of a fight. But we contemplated winning out.

Q. I will ask you to repeat what were the reasons you gave at the time Mr. Mahaney was present, why Senator Burton should not appear? A. If you will notice Judge Krum's question did not call my attention to any particular time, but rather to the reasons. My recollection was just this: That that matter was not discussed at all at that conference, but it was taken up between Judge Krum and I at our conference following that, after Senator Burton had gone to Kansas, and I agreed with Judge Krum after he had stated his position, and reported the matter back to Senator Burton, or Major Dennis—it could not have been to Senator Burton, because he was not here. Now, I may be mistaken about the time that came up, but I am not mistaken about the reasons given.

Judge Krum: Q. You are not mistaken as to the fact that no such statement was made in Mahaney's presence? A. No sir, I am not mistaken as to that.

Col. Dyer: Q. You stated, as I understood, that it was suggested at that time, by Judge Krum, that there was no

necessity for Senator Burton, by reason of the case? A. He felt it was not advisable to have too many lawyers appear in the case.

Q. You were a witness before the grand jury? A. Yes.

Q. Was this question put to you at that time in
258 reference to that conversation, and did you give the following answer "Question: Wasn't it said in the conference between yourself and Judge Krum that probably Senator Burton had better not appear, that it might detract from his influence at Washington", and your answer "no sir".

Judge Krum: I submit, if the court please, that the inquiry is not competent, for the reason that the examination of Mr. Harlan was not had for the purpose of any legitimate inquiry before the grand jury because the indictment of Senator Burton had at that time already been found and returned.

The Court: Q. Why do you ask him?

Col. Dyer: I ask him that with a view of ascertaining whether this is a correct answer to the question as to why Senator Burton was used as counsel.

The Court: It may be used to refresh his recollection.

Col. Dyer: Q. I will get you to state now and ask you to repeat to the jury what the conversation was between Judge Krum, Senator Burton, yourself and Mahaney, in reference to Burton's appearing in the Dennis case? A. I answered that. My recollection is that that conversation did not occur at all at that time, but that it came up a day or two later, when Judge Krum and I had our next conference. I was always contending that Senator Burton should appear, but Judge Krum thought it was not advisable for him to appear and I accepted that. My recollection is that was afterwards.

Q. That did not occur at the meeting spoken of with Judge Krum and Senator Burton together? A. That is my recollection.

Judge Krum: That proposition was to show by this witness that no such statement as Mahaney related was ever made in his presence,—as far as that is concerned, never was made as he testified. For that reason I asked Mr. Harlan's attention immediately to the matter.

259 The Court: Notwithstanding that, counsel for the Government have the right to find out what was said at the time.

Judge Krum: I am not disputing that at all.

Col. Dyer: Q. You say that at the time you met Senator Burton, you went over more particularly the business of the

Brooks Brokerage and Commission company? A. That is, the question growing out of that which I then had in hand as representing Major Dennis, the legal phases of it and the different cases.

Q. And you said substantially that the business of that concern was out of the way? A. At that time, yes, as a business. Of course these legal questions and these little suits and this matter before the grand jury was just then very much involved, but the company itself had ceased to do business.

Q. You said that the literature which was to be made up and sent out by this company was to be done under your supervision? A. No sir, I didn't say that. I beg your pardon, my dear sir,—I said it was part of my duty as counsel to pass upon that literature, and it was the practice of the company to submit it to me; but it was only under my supervision.

Q. Did you ever submit any of that literature to Senator Burton? A. I am not clear on that. I am not prepared to say whether I did or did not. I do not remember that I did, and yet it might have been.

Q. Don't you remember sending some of this literature to him at Washington with a view to getting his opinion as to whether it was matter allowed to go through the mail? A. I have no independent recollection on that,—well, I have a strong impression, if you will permit me to make a distinction between that I actually recollect, and my impression,—that it was sent to him. I believe it was, but I do not recall it. My impression is that I requested Major Dennis to have it
260 sent to him.

Q. In looking over the literature and comparing it, I show you this and ask you whether this booklet that I now show you "Giant oaks from little [acrons] grow", whether that literature passed under your observation or not, as Attorney for this Rialto Grain and Securities company. A. Well, it would be impossible for me to say whether this particular one did; but similar ones did.

Q. One like it? A. I mean this particular print. They were making changes all the time; but I had examined literature of that character.

Q. Didn't you send literature of that character to Senator Burton at Washington with a view and for the purpose of getting him to examine it, and, if necessary, submit it to the postal authorities at Washington to see whether it would go through the mails or not? (hands book to witness) A. No sir, absolutely I do not remember anything about sending that literature in any shape, manner, way or form. I have no recollection of it at all.

Q. I show you another booklet and ask you whether or not you had the Government to examine one like that? (hands

booklet to witness). A. Well, literature of a similar character, yes sir.

Q. Do you recollect sending any paper like that to Senator Burton? A. No sir, I do not remember sending him any literature. I won't say I did not, because I have no recollection upon that subject at all.

Q. You talked with him about this securities business as an adjunct to a trust company, or something of that sort? A. No sir.

Q. What was that underwriting? A. I simply used the illustration before the jury that I wanted to show Senator Burton that we would solicit from the trust companies who had underwritten the bond issues the sale of these securities.

261 Q. Did that interview ever culminate in anything? A. No sir, it did not.

Q. Was there ever a single solitary thing of that sort, or any business of that sort submitted to Senator Burton at Washington? A. No sir, that matter, owing to a run of unfortunate circumstances, was never able to be brought about. But up until probably the 1st of March we were still trying to bring that thing out,—that is, one condition after another had transpired which delayed it,—there is no use in detailing them,—but there was still some hope that we would be able to bring that out up to as late as the 1st of March.

Q. When, according to your understanding, did the relations between the Rialto Grain and Securities company and Senator Burton cease? A. Well, I was informed, I think by Mr. Mahaney—it must have been within a few days after Senator Burton's services ceased that Mr. Mahaney informed me—

Q. That was on the 26th of March? A. I understand from the testimony that it was.

Q. Were you there in St. Louis on the 26-h of March, 1903, when this money was paid? A. I don't know whether I was or not.

Q. Did you see Senator Burton here at that time? A. No sir, I did not see him.

Q. If he was paid $500 in advance and that was the understanding, then Senator Burton's connection with this company would not terminate until the 26th of April, would it? A. That is true, yes, if that was the advance payment of March.

Judge Krum: The 15th of April? A. The 15th is when it would be due.

Q. You say "your pay begins on this date, the 18th of November", the day after you got back from Chicago? A.

262 Yes. Before that we made it the 15th.

Q. So when he got his payment on the 26th of March it was a payment that should have been made to him on the 15th of March, is that true? A. I presume that it is.

Q. Then his connection with the company would have continued until the 15th of April, he being paid in advance? A. I assume that is true, yes sir.

Q. If he got $2500 from the company between the 18th of November and the 26th of March, it was not at the rate of $500 a month, was it? A. Well, you can figure that just as well as I can.

Q. His term would expire on the 15th of the month? A. Yes; on the 15th. Of course we could have held it to the 18th, but we made it the 15th.

Q. Was there anything said to you about dispensing with his services after congress had adjourned? A. Said to me by anyone?

Q. By anyone about the office, Mahaney or anyone else? A. I do not fix the date as far as congress is concerned, but it became apparent, as I said, along about the first of March that these securities might never be brought about, and I had given up all hope of it as far as I was concerned, and the question of retaining the Senator—Senator Burton, was discussed, and Mr. Mahaney and Mr. McRae particularly contended that we should not retain him any further. We had about concluded to close the contract when I was informed one day shortly afterward that Senator Burton had resigned.

Q. You said something about the time. Don't you know that these complaints made by Mrs. Hout and Mrs. Evans, were in the hands of the Post Office inspector here when you went to Chicago? A. I must have known it, yes sir.

Q. Didn't you know as a matter of fact, that Mr. Price, the post office inspector, was at the Rialto Grain and Securi-
263 ties company on the 11th day of November? A. Well, I know that now.

Q. Didn't you know it at the time you went there, that Mr. Price had been there as well on the 14th of November, three days before you started to Chicago with Senator Burton? A. I think the date was the 14th. I know that now, and of course I must have known it then. I do not want to say I did not know it. I will say I did know it, but I do not remember that matter being mentioned to Senator Burton.

Q. Not at all. But what I want to find out is as to whether, when you made this employment of Senator Burton, whether or not you knew that complaints were pending in the department against the Rialto Grain and Securities company? A. I evidently did, but I have no recollection of it.

Q. Now, in your letter notifying Senator Burton of that indictment of Major Dennis, when you wrote to him on the 29th of November, you say you are "greatly surprised at that indictment". Now, if you were actually surprised at the indictment of Dennis at that time, what did you say to him between here and Chicago as to whether or not in your opinion he would or would not be indicted? A. Well now, the expression of surprise in that matter, Colonel, had nothing to do with that matter. First, let me call your attention to something. You misunderstand that. If you remember, on the day before I went to Washington, I called on you; don't you remember that?

Q. Certainly. A. —and I told you I was going to Washington to consult with Senator Burton, that he was counsel in this case, and I felt it was only courtesy to go on and lay the matter before him and see if anything further could be done. Don't you remember that?

Q. Yes, and I told you that if an indictment was returned I would not have a capias issued until you got back, on
264 Saturday. But you didn't turn up on Saturday, so the capias was issued. A. Yes, exactly, and that is what surprised me, that the capias was issued.

Q. You had reference to your surprise in the capias being issued before you got back? A. Yes, that is what I referred to.

Q. In another letter you wrote, didn't you, telling Senator Burton that you did not believe Dennis would be indicted? A. Refer to the letter, will you, please?

Q. I will withdraw that question, and ask you this: In the first letter, after you had had that talk with Burton between here and Chicago, among other things you say "I don't know what reports have been sent in to the Post Office department at Washington, nor am I prepared to say that the Government intends to make a case against Major Dennis; but if you can find it convenient to inquire of these facts at the department, you may be able to perform for us a great service at this time." Now, was that letter asking for this service written by you because of what had occurred between Senator Burton and yourself, between here and Chicago? A. No sir, it had no reference to that.

Q. You felt, however, by reason of his employment that you had a right to call upon him for such a service?

Judge Krum: Certainly, as he was employed.

A. I did. I treated him as an associate from that time on.

Q. And you wanted him to go to the Post Office department at Washington and see about these facts, and you understood that his employment covered such service, didn't you? A. Now, Colonel, isn't that more a matter of construction from the letter, than a matter of fact.

Q. I ask you for a matter of fact? A. I told you if a situation of that kind arose I would undoubtedly ask Senator Burton, and then it was for him to say.

265 Q. Why would you ask him? A. The reason why was that he was associate counsel, located at Washington, and it was but a natural thing for me to do.

Q. Will you state to the jury what business the Rialto Grain and Securities company had at Washington?

Judge Krum: The inquiry was with reference to the Rialto Grain and Securities Company.

Col. Dyer: Q. I ask him what business the Rialto Grain and Securities Company had at Washington? A. They had no business at Washington, but if this securities business had gone through, they would have had a whopping big business there.

Q. But I want you to tell to this jury what business this Rialto Grain and Securities company had at Washington, for which the services of an associate counsel were needed at Washington? A. They did not have any business at Washington, never expected to have any, outside this other feature which, at that time, looked promising.

Q. With a view of calling your attention to it, I will ask you to state whether or not you did not answer, in response to this question put to you before the Grand Jury: Question: You understood by the payment of $500 a month, he was the representative of the Rialto Grain & Securities Company at Washington? You understood that?" Answer: Certainly, he was".

Was that question asked and that answer given? A. Well, if you have it there, it might have been answered in that way.

Q. Well, I will ask you whether or not that question was not asked you, and if you did not make that answer? A. I will accept the record of that, Colonel.

Q. This question was also asked "He was paid for it"? Answer: "He was representing the Company as paid counsel; no question about that". Was that your answer?

266 A. It undoubtedly was.

Judge Krum: There is no doubt about that.

Col. Dyer: (resuming) Q. "That is what the money was paid to him for"? Answer: Certainly; acting there as counsel" Was not that your answer? A. Well, I don't know how the word "there" got in there. But it is possible.

Q. Now you said something about Senator Burton saying "I don't want to be cut off with one payment of $500; I don't want to get cut off with a month". Then you said that if he

came out here in the Dennis case, and Dennis should be indicted; and when Dennis was acquitted, or that out of the way, he did not want to be cut off with $500? A. At the end of that month's pay.

Q. That had reference alone to that Dennis case, when he said he did not want to be cut off? A. Not until he referred to it in that way, don't you see.

Q. Exactly. Well, why, if you were going ahead with this bonding business, and this underwriting business, writing all these letters and extending the business of this concern in that direction, why should Senator Burton think he was going to be cut off with $500, if that business was going on? A. You are as capable of answering that question as I. I am trying to give you exact conversations.

Q. And you are giving your understanding of them, too? A. No, sir, unless I tell you so. When I give you my understanding, I tell you so; but when I give you conversations, I try to give the conversations.

Q. But I want to know if you mean to be understood as saying, that the reason why Senator Burton did not want to be cut off with $500 when the Dennis case was out of the way, that the amount of $2500 was agreed to be paid him over a certain period of time?

Judge Krum: He simply stated what Senator Burton said.

A. Maybe he did not have faith in what I told him. You have got to construe those things; I cannot.

267 Col. Dyer: Q. You never had any correspondence with anyone else, except Senator Burton, at Washington, in reference to the complaints and troubles of the Rialto Grain & Securities Company, did you? A. I don't think I did. I do not recall any. It does not occur to me now. I don't think I did.

Q. Well, all matters that you had at Washington for the Rialto Grain & Securities Company, in the department, was managed by Senator Burton, was it not? A. Were there any matters there?

Q. I ask you if you had any matters? A. There were never any, to my knowledge, that required any attention, to my knowledge.

Q. You [wrtoe] him on December 3rd to the effect that "On Monday of this week a man dropped into the office of the Rialto Company, by the name of Bowman, and he had an account with the Company, having invested about $1500, a part of which he had lost, etc." Now you made the request of him in that letter, did you not, to ascertain whether such persons were in the Department—whether such men were official inspectors? A.

Whether there was such a person employed, I believe is the language of the letter, yes, sir.

Q. Why didn't you write direct to the Post Office Department instead of to Senator Burton? A. Well, I might have done so. I wanted to catch that fellow; that is what I was trying to do.

Q. You thought you could catch him better through Senator Burton than through the Post-office Department? A. No, sir, I proposed to catch the man and then lay the matter before the Post Office Department. That is what I was working on.

Q. If you were trying to ascertain if these persons were actually Post Office inspectors, why did you feel at liberty to call upon Senator Burton for that information, instead of the Post Office Department at Washington, for the information? A. I felt at liberty to call upon him, as I have explained, because he was associate counsel and as such interested in the apprehension of those people, as much bound to catch them as I was. I wanted his assistance.

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Q. Now you have said something in this connection about the Securities Company: I will get you to state whether there was or not any change in the business, names of the officers, the persons who were managing the Rialto Grain & Securities Company, under this new organization, from what had obtained in the Brooks Brokerage & Commission Company? A. Oh, yes.

Q. Dennis was President of the Brooks Brokerage & Commission Company? A. Yes, sir.

Q. Were you a Director and counsel also, for that company? A. I had a share of stock.

Q. Weren't you a Director? A. Yes, sir, I believe so; they made me such while I was away.

Q. Unsolicited? A. That is true.

Q. I understand. Was not this Company, this Rialto Grain & Securities Company, organized because of the difficulty that Dennis had gotten in with the Brooks Brokerage & Commission Company? A. Well, it was apparent that the organization of that company, that it could not exist under its plan of business. Now, as to the identity of the officers, I think Maj. Dennis was the only one who held the same position with both companies.

Q. They occupied the same offices in the Rialto Building that the Brooks Company had, didn't they? A. Yes, sir.

Q. And how long had the Brooks Company been in those same rooms? How long had it been in existence? A. I don't know; possibly a year or so; I am not able to tell you accurately.

Q. You understood that they got the names of the persons with whom the company dealt—that is, with whom the
269 Brooks Company had been dealing; and they took charge of the books of that concern, did they not? A. Well, they remained there in that office, and of course the Brooks Company was just allowed to die. Its affairs were wound up gradually, and it went out of existence.

Q. But its books were left there in the Rialto Grain & Securities Company? A. Yes, sir, that is true; until they were turned over to the Post Office Department.

Q. And there never was any change in the offices of the Company from the time the Rialto Grain & Securities Company was organized, until they quit?

Judge Krum: What change?

Col. Dyer: Q. I mean change of rooms? A. I think in October they moved down in the Railway Exchange Building.

Q. This last October? A. Yes, sir.

Q. But as long as they were in active business, they occupied the same rooms that had been occupied by the Brooks Company? A. That is true, yes, sir.

Q. I will get you to state to the jury what services beyond the consultations you say were had in reference to the Dennis indictment, did Senator Burton render the Rialto Grain & Securities Company? What other services, for which he was paid $2500? A. Well, they used his name on the advertising matter. I saw it on that booklet there—by the way, I forgot to mention that. I knew that would be required, the use of his name. I knew Maj Dennis would place a value on that.

The Court: Q. You were asked what legal services were rendered. Answer the questions.

Col. Dyer: Q. What did Dennis say that day, that Burton's name would be published on the paper, and why was Burton's name published on the paper? A. Major Dennis is a very good advertiser. He will take any fair advantage for advertising purposes. I knew he would put a value
270 upon the use of Senator Burton's name on this advertising matter. So that, among other things, I called Senator Burton's attention to, was the right to use his name. That was in this general conversation.

Q. And what you explained to him, I take it, Mr. Harlan, was that Dennis, for the Rialto Grain & Securities Company, would want to use his name on the printed matter sent out, as being counsel for the Company, believing that by such use the business of the Rialto Company would be increased: Is that so? A. Yes, sir. I don't know that I explained it quite so

fully as that; but I do remember calling Senator Burton's attention to that, and getting his consent to it; and that was one of the moving considerations for his employment.

Q. I will get you to state, whether to your knowledge any of that matter, bearing the name of Senator Burton as counsel, was sent to the Post office Department at Washington—to your knowledge? A. Not to my knowledge.

Q. Then so far as this payment of money was concerned, or this agreement to pay money, the $500 a month, as part consideration Senator Burton was to allow the use of his name? A. There is no question about that.

Q. Now if you can think of any more, please state to the jury what other services were rendered by the Senator? A. Well, you see that McGowan matter. There was something referred to him in connection with that; that was a very large claim, this fellow made, a very large claim.

Judge Krum: That had nothing to do with the Post Office Department.

Col. Dyer: Q. Let me understand about that McGowan claim: You say he rendered services in that particular: Will you tell what services he rendered in that McGowan matter, that you know of? A. The service he rendered was limited.

Q. To what? A. To such labor he performed making it, necessary in answering the telegram I sent him inquiring about this man McGowan. 271

Q. You mean to say it was limited; he was to ask about McGowan—

Judge Krum: This has all been excluded.

Col. Dyer: I am asking about services.

Judge Krum: The Court intimated yesterday, it is not material.

The Court: It was not material, as then involved. But it is now given by him as one of the services rendered. What I understand is finally to be submitted to the jury, is whether the services were rendered in the Departments or not. It is proper to find out what services he rendered, as bearing on the question to be finally submitted to the jury. If he rendered services in any other Department, for which he was paid, it seems to me it is proper to be brought out.

Col. Dyer: Q. What had he to do with this McGowan matter? A. Under the terms of my understanding, I could call upon him to come here to St. Louis and take charge of the matter. But it did not go that far. It was limited, in that particular instance, to me forwarding to him a telegram of inquiry, and his making the inquiry, and replying to my tele-

gram, as far as I know. But that was one thing understood with Senator Burton, that he would come to St. Louis whenever called, provided it was not inconsistent with his duty to Congress.

Q. I have not your message, and you did not keep a copy? A. No sir; it was in pencil.

Q. And you know that the messages are destroyed, after a certain length of time, by the Telegraphic authorities? A. I believe that is the rule.

Q. Do you recollect the substance of your message to him, sent at that time? A. I do not like to undertake to state that very accurately, but it was an inquiry concerning a man by the name of McGowan, who was here, making some
272 claim, which was undoubtedly outrageous; and seeking to use his position as Indian Agent, because he was working for the Federal Government, and mentioning this,—which was very disgusting. And I wired to Senator Burton to find out who he was, or if he actually was what he represented himself to be.

Q. Did you know, of your own knowledge of the sending to Senator Burton to cease that investigation of McGowan at Washington, by Mahaney? A. No, sir, I did not, until after it was done.

Q. But you do recollect receiving this message in reply to yours, from Senator Burton, at Washington, in reference to this matter of McGowan? A. Let me see the telegram.

Judge Krum: That is a matter that was excluded by the Court.

Col. Dyer: The telegram is in evidence; it was offered and read; but the testimony of the Commissioner of Indian Affairs was not allowed.

Col. Dyer: Q. You informed Senator Burton by this wire, that this man was making a claim against the Rialto Grain & Securities Company, and that the sum he claimed was a large sum: Did you state how much? A. I don't know whether I did or not.

Q. Didn't you ask him to see who McGowan was? A. I asked him to find out who McGowan was.

Q. He claimed to be an Agent of the Commissioner of Indian Affairs, did he not? A. He claimed to be an Indian Agent.

Q. Why, if you wanted to find out about McGowan, who belonged to the Commissioner of Indian Affairs office, why did you ask Senator Burton to find out about that?

Judge Krum: That is immaterial. I understood the ruling of the Court to exclude that, on the ground it was offered

by the Government to support the indictment, and it did not do so. Now affirmative inquiry has been permitted by
273 the Court on the cross examination of this witness, as to what Senator Burton did. He was paid so much money. What did he do? And it was on that line the Court has permitted this inquiry in respect to this matter. (here follows further argument.)

The Court: The objection is sustained. I cut the question out on yesterday, because it did not involve so far as testimony went, any action or services rendered by the defendant in the Post Office Department. I did it for the purpose of eliminating all foreign matters.

At this point recess was taken until two o'clock p. m.

Friday, March 25, 1904.

After recess, court convened at two o'clock, and the following proceedings were had:

Col. Dyer: Q. Mr. Harlan, at the adjournment, I was asking you about the services rendered by Senator Burton: I will ask you now to state what other services, if any, were rendered by Senator Burton to the Rialto Grain & Securities Company, or to Major Dennis, that you can now recall? A. In addition? Well, I called him in the Bowman matter.

Q. That is the one you have reference to, in the Inspectors? A. The man who was not an Inspector, but who represented himself to be an inspector.

Q. Yes. A. Now I do not recall any that was submitted to Senator Burton, in which he took part. The Company had the right to call him in.

The Court: You have answered the question. Confine yourself to the questions as put.

Col. Dyer: Q. You also stated, in answer to Judge Krum, that as far as you know of your own personal knowledge, that the business of the Rialto Grain & Securities Company
274 was carried on, on a different plan from that which had obtained in the Brooks Company, and, so far as you were advised, the business of the new Company had been conducted properly? A. Yes, sir.

Q. I will get you to state whether or not you know, as a mattter of fact, that indictments were pending in this Court against Mahaney, McRay and Dennis, growing out of the management of the Rialto Company?

Mr. Lehman: We object to that, if your Honor please. That matter was gone into on the direct examination just as it was on the State's case, on the theory approved by the

court—and I think correct beyond question—that it was relevant and proper to show what was stated to the defendant in that connection; and the examination has been limited to that. And the fact itself the Court has held to be immaterial, and manifestly must be so, or would have led to very different evidence. Everything introduced thus far has been in respect to statements made to the defendant at the time he was engaged as counsel.

Col. Dyer: It is offered only for the purpose of showing, not that in point of fact the Rialto Company violated the law, but in response to the question put to this witness, that the Company was open always to investigation. (Here follows further argument).

The Court: I understand the situation without any further argument. The objection is sustained, because I do not intend to go into what that Company was, one way or the other. It is not involved in this inquiry. That involves necessarily, whether an indictment was found, and the first thing we know we would be inquiring into the matter of whether that Company was conducting its business lawfully. That is not competent in any phase of this case.

Col. Dyer: Q. You have spoken of your visit to Senator Burton in the latter part of November, 1902, will you
275 state to the jury what your purpose was in seeing Senator Burton? A. Yes, sir. I went to see Senator Burton to go over with him the matter then in hand, namely, the question of whether anything further could be done, ought to be done, that might set the Government right, if you please, or to prevent the indictment of Major Dennis. I was moved to that—

Q. It does not make any difference how you were moved to it. Did you go to Washington to see him in reference to trying to prevent an indictment? A. Not to try to prevent the indictment.

Q. To do what? A. To consult with him, as one of the counsel in the case, for the satisfaction of my client.

Q. In your letter of December 2, 1902, you say, among other things "On Saturday night (this is a letter to Burton) I wired you that indictment had been returned, bond given, etc. I was somewhat surprised on my return here on Saturday night to be met at the train by one of the clerks of the Rialto company, who informed me that Major Dennis and Mr. Garland had been indicted and that day arrested". Now, after hearing that read, will you say that you were surprised that he was arrested, before your return, in consequence of the talk you had had with me; or, were you in fact surprised that an indictment had been found at all? A. No, sir. Colonel, if you remember, I wired you from Cincinnati that I was coming?

Q. That you were on the way, and had missed connection. A. Yes, sir. And I expected—without any reason, of course—that that matter would be held until I got back, and that was the reason for my surprise. I was not surprised at the indictment.

Q. You had no intimation that any indictment would be found against Dennis, had you? A. No, sir, except my own knowledge of the conditions. I was thoroughly familiar with the case.

276 Q. Now in that connection; in this letter to Senator Burton you said this, "Thus you will see, that all efforts to prevent this matter were defeated, almost before we got started": What did you mean by that expression? A. To the best of my recollection we were bending our efforts at that time, by the production of evidence, which I dug up, in conjunction with the Post Office Inspectors, to show that if there was any guilt, it lay with Brooks and Walden; and hoping that by the production of that evidence the Government would see that position and select Dennis as the prosecuting witness in this case.

Q. In point of fact, was it not your purpose in going to Washington to see the defendant, to present to him these facts that you had dug up, with a view of having them laid before the Post Office Department, and from that Department secure directions to the Local Post Office Inspectors to discontinue the investigation against Major Dennis? A. No, sir, Colonel, my dear sir, I never did anything like that.

Q. Well, I am only asking you about this phrase "Thus you will see all efforts to prevent this matter were defeated, almost before we got started": What did you mean by getting started?

Judge Krum: He has explained that.

A. I do not recall the conditions sufficiently clearly now to be able to answer any more definitely. I wish I could.

Q. Did you take the evidence that you had dug up, with you to Washington? A. Oh, no. That was a mass of stuff. I do not remember taking anything. Very much of it at that time had been turned over to the Post Office Department.

Q. Now in this letter you also say, after speaking of the class of claims made here, "In all such cases we have determined to stand strictly on our rights, and the result will be numerous complaints pouring into Washington from different parts of the country". In this letter, to whom did you expect these complaints that were to pour into Washington would go? A.

277 I only know from the rules of the Department that in the natural course of affairs they would be sent here for investigation.

Q. Now when you wrote Senator Burton this letter, and apprised him of the condition of affairs here, and notified him that complaints would probably pour into Washington, you knew at the time you wrote that letter, that the complaints would go to the Post Office Department, if they went anywhere, didn't you? A. Yes, sir.

Q. Now after stating that fact, of these complaints pouring into Washington, and knowing the Department to which they would go, you said this in this letter to him: "At your end of the line, you will of course use your own judgment in handling the situation"; What situation had you reference to? A. Undoubtedly the situation referred to in the letter. It is the only situation that that letter referred to.

Q. That is to say, Mr. Harlan, when you wrote this letter to Senator Burton, you apprehended that various complaints would go into the Post Office Department at Washington, against the Rialto Grain & Securities Company, did you not? A. I did.

Q. And when you state "At your end of the line handle these complaints in your best judgment", that is what you meant he should do? A. No, sir, that is not what it said?

Q. "At your end of the line, of course you will use your own judgment in handling the situation". Those are your words? A. Yes, sir.

Q. What did you mean by that?

Judge Krum: I submit he has already answered that.

The Court: He has already answered, he said he expected complaints would go to the Department.

Col. Dyer: Q. Now in this same letter you say "Locally I believe we will be able to control the situation, as this business has been pretty thoroughly gone over by the Inspectors, and they understand just what we are doing and how we are
278 doing it": In making that statement to him as to how you were expecting to take care of it locally what did you mean by that, other than you would attend to it locally? did you expect him to take care of another part, at the other end of the line, if you could take care of it locally, here; did you expect him to take care of it at the other end, at Washington?

Mr. Lehmann: I submit no interpretation can be put upon the language of the letter, other than is shown by the language itself.

The Court: In the light of the examination of this witness in chief, this is competent.

A. It was left to his judgment, as to whether he would or not. And I meant to leave it to his judgment as to whether he would or not.

Q. Your purpose was to state the actual conditions that existed, for his information, and leave it for him to determine what was the best course for him to pursue at Washington? A. Not the best course, necessarily; but what course he might consistently pursue.

Q. What course he might take it upon himself to pursue? A. Yes, sir.

Q. Now in your letter of December 3, to him, in speaking of these persons representing themselves as Post Office Inspectors, you say "But if they are Post Office Inspectors then it would appear that some order had been issued, evidently from headquarters, to try to catch the Rialto Company in a trap": What did you mean by headquarters"? A. That has reference to the Postal Department, undoubtedly.

Q. At Washington? A. At Washington, yes, sir.

Q. Then in that letter you ask "Would like to know if we are being investigated in this matter" you state the situation to him, with a view of getting from Senator Burton information as to whether this Company was in point of fact being investigated? A. That is the purport of that letter, yes, sir.

279 Q. Now in answer to that letter, you received a letter from Burton, in reference to what he had ascertained in reference to that matter, that there were no such Post Office Inspectors? A. Yes, sir.

Q. Did you include that in your estimate of any service that was rendered by the defendant to the Company? A. Why, I never thought anything of it, one way or the other, Colonel, in that connection.

Redirect Examination

By Judge Krum:

Q. Mr. Harlan,did you ever proceed, at any time, as between Senator Burton and the Rialto Grain & Securities Company, that he was obliged or could be required, after his contract, to appear for the Company in any matter before the Post Office Department, or any other Department? A. No, sir.

Q. Now with reference to these two letters that you say you returned to Senator Burton, and which he told you afterwards he himself had destroyed: Did those two letters in any way whatever, have any bearing upon or any connection with, any of the matters of the Rialto Grain & Securities Company, or anything involved here? A. To the very best of my recollection, they did not.

Q. Is there any doubt about that at all? A. No, sir, there is no doubt about it at all.

Q. Now, Mr. Harlan, is it or is it not a fact, that by reason of the relations existing between Senator Burton and yourself, you went to him or sent to him, for purposes of information, just as you would send to any other Senator or any Member of

Congress, who had access to the Department, with whom you were connected, or with whom you were acquainted? What I want to get at is, whether you went to the Senator or sent to him on any occasion, on the hypothesis that here was something he was required to do, and, accordingly you communicated the matter to him to do or perform? A. It was more
280 on account of my acquaintance with him.

Recross-Examination

By Col. Dyer:

Q. You say you made these requests more on account of your acquaintance with the Senator than anything else? Were you acquainted with Senator Cockrell? A. No, sir.

Q. Were you acquainted with any Member of Congress from St. Louis? A. Not very well.

Q. Your acquaintance with our own Senator and our representative in Congress was not of such a character as you thought you had the right to call upon them for this information? A. No, sir; I have a mere speaking acquaintance with Mr. Joy, and he is the only man I do know.

M. G. Price, a witness of lawful age, being duly produced, sworn and examined in behalf of the defendant, testified as follows:

Direct Examination

By Judge Chester M. Krum:

Q. What is your name? A. M. G. Price.

Q. What official position have you under the United States? A. Post Office Inspector.

Q. In? A. The St. Louis division.

Q. In the Fall of 1902 were you here in St. Louis? A. Yes, sir.

Q. I show you two letters which have been introduced here, one from Bella Evans, and the other from Mrs. K. C. Hout, together with the garment which contains them—called a jacket—and get you to state to the jury whether you had any connection with any investigation of those two matters here in St. Louis? A. I did.

Q. When were they turned over to you, if you recall? A. On November 14th.

Q. What did you do with reference to them? A. I made the inquiry and investigated the records of the Rialto
281 Grain & Securities Company, that same day.

Q. Then what did you do? A. I returned the case to the office.

Q. With any report of it? A. No, sir.

Q. Was anything further shown with reference to these two matters? A. These two complaints? No, sir.

Q. Why was that? A. Well, investigation of the records satisfied me that the complaints were not warranted.

Q. And, therefore, nothing further was done? A. On these complaints, no sir, at that time.

Cross-Examination

By Col. Dyer:

Q. When such a paper as that is referred to you, when the matter is closed up generally, do you make a written report? A. Yes, sir, when the case is closed we recite the history and conclusion of the case, and recommend that it be closed.

Q. Was there any such thing done in this case by you? A. No, sir.

Q. Subsequently, did you make further investigation under this same number of this same jacket, of this concern? A. Yes, sir.

Q. I do not ask you what your conclusions were in reference to that, but was the matter embraced in this Number of the case sent to you, subsequently considered by you and other Inspectors, or any more Inspectors? That is, did you investigate this Company further with reference to complaints that were jacketed with this? A. Yes, sir.

Q. And upon that case was there ever any report in writing made by you to your Chief Inspector here, the Chief Inspector in charge, Col. Dice, in case No. 13778 O? A. There was, in the latter part of August, 1903.

Q. Now those reports that are made by local inspectors, or reports are made to the Inspector in charge here, are they not? A. Yes, sir.

282 Q. You do not communicate with the Department at Washington, except through the Post Office Inspector in charge here? A. No, sir.

Q. Your report, in all instances, is submitted to him? A. Yes, sir.

Q. And he either approves or disapproves the report, and he is the one who has the official correspondence at Washington, with the Chief Inspector in charge? A. Yes, sir, that is correct.

Redirect Examination

By Judge Chester M. Krum:

Q. When, after this first matter, Mr. Price, do you recall, was there any examination here into the business or methods of the Rialto Grain & Securities Company? A. Well there was a thorough investigation made, which began on July 27th, I believe, and concluded in the latter part—it extended over two or three weeks, in which Inspector Piatt and myself were engaged.

Q. From the time in November, at the time you examined the complain-s of Mrs. Evans and Mrs. Hout, from that time down to July, when you conducted the thorough examination, was there any examination made? A. I possibly made inquiry on some complaints that came in during the interval. There were only a few for a time there that came in.

The Court: Q. What do you say about it? A. From November 14th, in reference to these two complaints, there was possibly four or five or a half dozen came in, making inquiry, on which I would probably go down there and make inquiry as to their standing, and what the condition was. But the general investigation, the final investigation was made from about July 27th to about the middle of August.

Q. Refer to this paper (indicating carbon copy of jacket) which is in evidence; you find here a complaint of Fravel, and of Allen, and of Warner—which are in evidence here.

283 Q. Do you recall any examination or investigation in regard to those complaints? A. To begin with, I don't know anything about this (indicating carbon or jacket).

Q. That is the Washington paper? A. Yes, sir. If those complaints were in that period, I probably made iquiry about them; but I do not recollect them from that designation. I don't know whether it was a complaint, or literature submitted and inquiry made as to what it was.

Q. It so happens that it was literature submitted, with inquiry about it: Suppose it were literature submittted, and that was referred here, what would be done in regard to that? A. It would be put in the files of the case.

Q. Would any investigation be made of it? A. Ask if they had any transactions with those people; that would be nothing uncommon.

Q. During the period of the business of the Rialto Company, Mr. Price, I will get you to state whether or not you had access down there to the books and papers of the Company at all times? A. Yes, sir, I principally called on Mr. Harlan and he submitted everything I called for.

Judge Krum: I offer in evidence indictment No. 4172 in this court, of the United States versus Hugh C. Dennis and Thomas W. Garland, filed November 24, 1902, and call attention to it sufficiently to indicate that it was an indictment under section 5480 of the Revised Statutes of the United States, with reference to an alleged scheme to defraud, which was to be effectuated by the use of the mails of the United States; there being two counts, both based upon the use of the mails, through the deposit of a letter by the Brooks Brokerage & Commission Company.

We also offer in evidence the verdict of the Jury, returned on the 20th day of Januafy, 1903, to show the date of the determination of the case; the verdict showing that by direction of the Court the defendants were adjudged not guilty.

284 Col. Dyer: There is no objection to that, if with it the official statement of the Court may also go to the jury, as to why it was done; otherwise, they would be left in the dark.

Judge Krum: We have no objection to that.

The Court: We will go no further than that: You have gone far enough when you offer the verdict.

Mr. Lehmann: We wished to show the date of the verdict.

The Court: The date would have been fixed when the verdict was offered, without stating what the verdict was.

285 United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

In the District Court of the United States, in and for the Division and District aforesaid, at the November Term thereof, A. D. 1902.

The Grand Jurors of the United States, impaneled, sworn and charged, at the Term aforesaid of the Court aforesaid, on their oath present: that Hugh C. Dennis and Thomas W. Garland, on the 1st day of June, 1902, at said Division of said District, and within the jurisdiction of said court, did then and there unlawfully and feloniously devise a scheme and artifice to defraud Frank Wilgus, B. F. Woodlee (whose christian name is to the Grand Jurors aforesaid unknown) and divers other persons, whose names are to the Grand Jurors aforesaid unknown, and for that reason cannnot be given, of their money and property, upon their, the said Frank Wilgus and B. F. Woodlee, and said divers other persons, responding to the request, solicitation, proposal and representation of said Hugh C. Dennis and Thomas W. Garland as hereinafter set forth.

That said scheme and artifice to defraud, so devised as aforesaid, was to be effected by the said Hugh C. Dennis and Thomas W. Garland by then and thereafter opening correspondence and communication with said Frank Wilgus, B. F. Woodlee, and said divers other persons to the Grand Jurors aforesaid unknown, resident within and without the United States, by means of the post office establishment of the United States.

That said scheme and artifice to defraud, so as aforesaid devised, was as follows: that they, the said Hugh C. Dennis and Thomas W. Garland, under and in the name of the Brooks Brokerage & Commission Co., should hold themselves out to

and put themselves in communication with (by means of the post office establishment of the United States) the said
286 Frank Wilgus B. F. Woodlee and the said divers persons so as aforesaid to the Grand Jurors aforesaid unknown, and in the name of the Brooks Brokerage & Commission Co., as aforesaid, as brokers engaged in the business of buying and selling grain and provisions on commission, and thereby induce the said Frank Wilgus, B. F. Woodlee, and said divers other persons, to order the purchase or sale of grain and provisions, and deposit with the said Hugh C. Dennis and Thomas W. Garland, under the name of the Brooks Brokerage & Commission Co., large sums of money as margins on said orders of purchase and sale, so as aforesaid solicited, without any purpose or intention upon the part of them, the said Hugh C. Dennis and Thomas W. Garland, acting as aforesaid, under the name of the Brooks Brokerage & Commission Co., as aforesaid, to make purchase or sale of the grain and provisions as should be or might be ordered by the said Frank Wilgus and B. F. Woodlee and said divers other persons, but upon the contrary to embezzle and appropriate to their own use said money, which might be as aforesaid deposited in the hands of them, the said Hugh C. Dennnis and Thomas W. Garland, in and under the name of the said Brooks Brokerage & Commission Co., as aforesaid.

That in pursuance of, and in executing said scheme and artifice to defraud, so devised as aforesaid, and in and for executing the same and attempting so to do, the said Hugh C. Dennis and Thomas W. Garland on the 11th day of July, 1902, at the Division and District aforesaid, did wrongfully, unlawfully, and feloniously deposit and cause to be deposited in the United States post office at the City of St. Louis, in the State of Missouri, and in a branch post office thereof, and in a street and hotel letter box thereof, to be sent and delivered by the post office establishment of the United States, a certain letter and writing, which was then and there enclosed in an envelope, having thereon the address and superscription, to-wit: "Mr. Frank Wilgus, La Cygne, Kans.", and post-marked, St. Louis, Mo., July 11, 1902, 9-30 P. M., and which envelope then
287 and there contained a letter and writing of the tenor following, to-wit:

Brooks Brokerage & Commission Company.
Incorporated.
Successors to Chas. H. Brooks & Co.
Grain and Provisions.
Orders Executed on Margins.
218 to 224 Rialto Building.

St. Louis, Mo., July 11, 1902.

Mr. Frank Wilgus,
La Cygne, Kans.

Dear Sir: We are in receipt of your favor of the 10th, inst. enclosing remittance for $24.30, with instructions to invest same in corn for September delivery, and to handle your purchase as our judgment may dictate. In compliance therewith, we take pleasure in handing you confirm of purchase by you to-day of 950 bushels for September delivery at 62 cents per bushel, protected by a margin of 2 1/2 cents per bushel.

We believe you have made an excellent investment, and one which will shortly show you a handsome profit. In fact we do not believe a person can make a mistake by investing largely in corn for September delivery at the present time. You have probably noticed that the Gates people have pushed the price of July corn up to 90 cents. There will be less corn in the market in September, as already over 20,000,000 bushels of corn have been sold for delivery that month. As a consequence, it will be an exceedingly easy matter to push the price of September corn far above $1.00 a bushel. We believe that the present prices are as low as September corn will ever sell for, and that those who are fortunate enough to secure corn at the present market prices, will profit largely.

We will handle your trades as you suggest, and take care of your interests as though they were our own, and we believe that the manner in which your investment will be handled will please you. We will send you daily the financial
288 edition of the St. Louis Star, which gives an excellent market report, and we will keep you fully informed of all transactions we make for your account.

Thanking you for your order, we remain,

Very respectfully yours,
BROOKS BROKERAGE & COM. CO.,
By Hugh C. Dennis, Treasurer."

S. H.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Second Count. And the Grand Jurors aforesaid, on their oath aforesaid, do further present: that on the day and year aforesaid, at the Division and District aforesaid, and within the

jurisdiction of said court, the said Hugh C. Dennis and Thomas W. Garland, did then and there unlawfully and feloniously devise a scheme and artifice to defraud Frank Wilgus, B. F. Woodlee (whose christian name is to the Grand Jurors aforesaid unknown) and divers other persons whose names are to the Grand Jurors aforesaid unknown, and for that reason cannot be given, of their money and property, upon their, the said Frank Wilgus, B. F. Woodlee, and said divers other persons responding to the request, solicitation, proposal and representations of said Hugh C. Dennis and Thomas W. Garland, as hereinafter set forth.

That said scheme and artifice to defraud, so devised as aforesaid, was to be effected by the said Hugh C. Dennis and Thomas W. Garland, by then and thereafter opening correspondence and communication with said Frank Wilgus, B. F. Woodlee, and said divers other persons to the Grand Jurors aforesaid unknown, resident within and without the United States, by means of the post office establishment of the United States.

That said scheme and artifice to defraud, so devised
289 as aforesaid, was as follows: that they, the said Hugh C. Dennis and Thomas W. Garland, under the name of the Brooks Brokerage & Commission Co., should hold themselves out to and put themselves in communication with (by means of the post office establishment of the United States) the said Frank Wilgus, B. F. Woodlee, and the said divers other persons so as aforesaid to the Grand Jurors aforesaid unknown, and in the name of the Brooks Brokerage & Commission Co., as aforesaid, as brokers engaged in the business of buying and selling grain and provisions on commission, and thereby induce the said Frank Wilgus, B. F. Woodlee and said divers other persons, to order the purchase or sale of grain and provisions, and deposit with the said Hugh C. Dennis and Thomas W. Garland, under the name of the Brooks Brokerage & Commission Co., large sums of money as margins on said orders of purchase and sale, so as aforesaid, solicited, without any purpose or intention upon the part of them, the said Hugh C. Dennis and Thomas W. Garland, acting as aforesaid, under the name of the Brooks Brokerage & Commission Co., as aforesaid, to make purchase or sale of the grain and provisions as should or might be ordered by the said Frank Wilgus, B. F. Woodlee and said divers other persons, but upon the contrary to embezzle and appropriate to their own use said money, which might be, so as aforesaid, deposited in the hands of them, the said Hugh C. Dennis and Thomas W. Garland, in and under the name of the said Brooks Brokerage & Commission Co., as aforesaid.

That in pursuance of, and in executing said scheme and artifice to defraud, so devised as aforesaid, and in and for executing the same and attempting so to do, the said Hugh C. Dennis and

Thomas W. Garland, on the 7th day of July, 1902, at the Division and District aforesaid, did wrongfully, unlawfully
290 and feloniously deposit and cause to be deposited in the United States post office, at the City of St. Louis, in the State of Missouri, and in a branch post office thereof, and in a street and hotel letter box thereof, to be sent and delivered by the post office establishment of the United States, a certain letter and writing, which was then and there enclosed in an envelope, having thereon the address and superscription, to-wit: "Mr. B. F. Woodlee, P. M., Forest, Tenn.", and post-marked St. Louis, Mo., July 8, 1902, 1-30 A. M., and which envelope then and there contained a letter and writing of the tenor following, to-wit:

Brooks Brokerage & Commission Company.
Incorporated.
Successors to Chas. H. Brooks & Co.
Grain and Provisions.
Orders Executed on Margins.
218 to 224 Rialto Building.

St. Louis, Mo., July 7, 1902.

Mr. B. D. Woodlee, P. M.,
Forest, Tenn.

Dear Sir: We beg to acknowledge receipt of your favor of July 1st., inclosing remittance for $75. with instructions to invest same in corn for September delivery. In accordance therewith we beg to hand you confirm of purchase by you of 3750 bushels of September corn, bought at 62 1/4 cents and protected with a margin of 2 cents.

We believe that you have made this investment at the right time, for September corn has every appearance of going up several cents a bushel within the next ten days.

We shall be pleased to give your investment our personal attention, and trust that the manner in which we handle same will meet with your approval.

291 Thanking you for your order, we are

Very respectfully yours,
BROOKS BROKERAGE & COM. CO.,
By Hugh C. Dennis, Treasurer.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Signed) DAVID P. DYER,
United States Attorney.

Indorsed: No. 4772. United States District Court, Eastern Division, Eastern District of Missouri. The United States vs. Hugh C. Dennis and Thomas W. Garland. Indictments for Violation of Sec. 5480. A True Bill. Robert McK. Jones, Foreman Grand Jury. Filed Nov. 24, 1902. Wm. Morgan, Clerk.

292 Which said verdict is in the words and figures following, to-wit:

United States of America
Eastern Division of the Eastern
Judicial District of Missouri—ss.

In the District Court of the United States in and for the Eastern Division of Said Judicial District.

November Term, A. D. 1902, Tuesday, 20th January, 1903.

The United States, Plaintiff,
No. 4772 vs.
Hugh C. Dennis and Thomas W. Garland, Defendants.

Indictment for Violation of Sec. 5480 of the Rev. Stats. of the United States.

We, the jury, in the above entitled cause, by direction of the Court find the defendants Hugh C. Dennis and Thomas W. Garland, not guilty, as charged in the indictment.

(Signed) P. RITCHIE.
Foreman.

293 W. W. Smith, a witness of lawful age, being duly produced, sworn and examined, in behalf of the defendant testified as follows:

Direct Examination

By Judge Chester M. Krum:

Q. What is your name? A. W. W. Smith.

Q. Where do you live Col. Smith? A. Topeka, Kansas.

Q. What is your occupation? A. I am private Secretary to Senator Burton.

Q. How long have you held that relation to the defendant? A. To the—I do not recall the time, but since he has been Senator, two or three years.

Q. I show you a letter from Senator Burton, of the 20th of November, 1902, one of December 9, 1902, one of January 19, 1903, and one of February 11, 1903: Who, if you know, signed the letter which is dated the 20th of November, 1902? A. (After examining letter) Senator Burton.

Q. Do you remember the circumstances of writing that letter? That is, whether he dictated it to a stenographer or gave

you directions in regard to writing the letter and sending it? A. I do not remember distinctly in regard to this letter.

Q. Now, in that connection, just indicate to the jury what the practice in the Senator's office has been, with reference to writing letters; what is the process ordinarily followed?

Col. Dyer: I object to what the practice was in his office about writing letters.

The Court: The court does not understand the purpose, now; perhaps it will be plainer later on.

Judge Krum: The defendant does not try to disclaim any responsibility for those letters at all; but it [—] proper to show the circumstances under which they were written, and how they came to be written.

A. I write a great many of the Senator's letters—the larger portion. That is, I dictate them.

294 Judge Krum: Q. This letter to which your attention was first called, was dictated by him, if you know? A. I would not be positive about that letter.

The Court: That is the one of November 20? A. Yes.

Judge Krum: Q. That is, you cannot say whether you dictated that letter, or whether the Senator himself did? A. No, sir. I write the greater portion of the letters. But, as a rule, those I write I sign. That is, I sign his name.

Q. With his authority, of course? A. Yes, sir. This one (indicating letter of November 20, 1902) is signed by the Senator himself; hence, I am inclined to think he dictated it.

Q. Now turn to the next one, the letter of December 9, 1902. A. I have it before me.

Q. Who wrote the signature on that letter? A. That is my signature.

Q. That is, your writing? A. Yes, sir.

Q. What have you to say as to the authorship of that letter; whether the Senator dictated it, or whether you dictated it? A. Well, there are expressions in this letter that I have used frequently, and I am very much in doubt as to who wrote it. I would not pretend to say that I dictated it, or the Senator did. I am practically unable to say.

Q. Does the fact that you yourself signed it, in his name, have any bearing with you as to the authorship of it and who probably dictated it? A. No, sir; he frequently dictates letters, and then the letters come to me from the stenographer, and I run over them and sign them.

Q. Now take the letters in this next lot here—one of the 19th of January and one of the 11th of February: Who signed those? A. The letter of January 19th, I signed this letter.

Q. Turn to the next one and see who signed that? A. February 11th. This is my signature.

Q. Now is there anything about either of those letters
295 from which you can tell who was the author of them, in the sense of having dictated them, either of them, to the stenographer, or written it himself? A. No, sir, I did not see anything in either of these letters. There is an expression in this letter overe here, that makes me in doubt about it.

Q. To which one do you refer? A. I am in doubt as to the one of December 9th.

Q. What is the expression that you refer to? A. "I will take care of things at this end of the line". I can explain why I am in doubt about that, if you wish it.

Q. Is there anything about that, that inclines you to the conclusion that that is an expression of yours, or an expression of the Senator's? A. I am inclined to think that is an expression of mine, although I am not positive about it.

Q. Why so? What is there about it, to indicate that? A. I have charge of all the business in relation to pensions which we have a great many of. The claimant at the Pension office writes the Senator, I take it and go to the Pension office, try to find out what is necessary—

The Court: I do not think that is proper.

A. It is that I used that expression in those letters.

The Court: Q. Do you know you did, or did not? Do you say you dictated this letter? A. I am not positive; I would not swear.

The Court: Q. It is in the nature of a conjecture? A. Yes, sir.

Judge Krum: Yes, of course it is; that is all it is offered for.

Q. Were you in the office in Washington when the Chief Post Office Inspector and the Inspector Vickery, came into the office? A. Yes, sir.

Q. And had a conference with the Senator? A. Yes, sir.

Q. I will get you to state to the jury what occurred on that occasion: That is, what was said on that occasion by
296 either Senator Burton or Mr. Cochran? A. Without going over all that was said, the statements that were made by those two gentlemen were practically correct, but it was not completed.

Q. What further than they have indicated, according to your recollection occurred? A. When the Senator got through Mr. Cochran said, "Well, Senator, I will make one statement: You did say you were not employed to go to the Department, by anybody, and that you could not be employed to go to the department by anybody for pay or against the government.

Q. Now, with that exception, your judgment is, that the statements made by Cochran and Vickery were substantially correct as to what occurred? A. That is my recollection, yes.

Q. Do you remember the date of that interview? A. I don't remember the date, but it was the Saturday evening that we received information that the Senator was indicted.

Cross-Examination

By Col. Dyer:

Q. You have stated about the course of business in the defendant's office; I will ask you to state if it is not true that Senator Burton would frequently dictate a letter and before the stenographer could transcribe the notes he himself would leave, with directions to you to sign his name? A. Oh, yes, yes.

Q. Wasn't that the usual course that was pursued in the office by him, of his letters in reference to important matters where he was otherwise engaged, that he would dictate the letters, leave the office, and from the stenographer you would receive the letter written, and sign his name to it? A. Very often that occurred.

Q. Now, is there anything in this letter of Dec. 9th, that would lead you to believe that you dictated the letter rather than that it was dictated by Senator Burton, and in that
297 connection, I call your attention to this part of the letter: "I would suggest that you prepare carefully the case of Dennis for trial next month, and I have learned to know that you must watch carefully that the jury is not set up on you" Did you dictate such a thing as that? A. Let me explain how that would come about.

Q. Did you dictate that? A. I cannot say. I had said I would not swear that I dictated that letter.

Q. Is there any expression in this letter other than the one "I will take care of things at this end of the line" that in anywise sounds like your dictation? A. That line is what calls my attention to the fact that I may have dictated it.

Q. Then were you sufficiently acquainted with the business that was being transacted at St. Louis to give directions to a lawyer here to look out and watch carefully that the Jury is not set up on him? A. I am very familiar with the Senator's business, all of it, and if I dictated this letter, it was upon a statement of the Senator in regard to the dictation or in regard to the writing of the letter.

Q. You would not, in a matter of this kind, undertake to send out any letter of importance without first consulting your chief in reference to it, would you? A. Oh yes, that occurs right along.

Q. That is, in routine business concerning pensions, and one thing and another, you write these letters after you make the examination? A. Yes, sir.

Q. During this time, between November, 1902 and March 1903, did you, at the direction of Senator Burton, make any visits to the Post office department in regard to the Rialto Company? A. Not any.

Q. At no time during this period were you ever sent by him to the department? A. Oh, yes. I recalled, on yesterday that the day Mr. Burton was in Mr. Cochran's office with
298 Mr. Dennis, I had an errand there, and I dropped in at at the time they were there in connection with this business.

Q. I asked you, did you ever go to the post office department in reference to this business, for Senator Burton. A. Never.

Q. Did he consult you at any time in reference to any complaints about the Rialto Grain and Securities Company? A. Not any, never.

Q. Did you at any time and at his instance, ever render any service in Washington to the Rialto Company? A. Not to my knowledge.

Judge Krum: This does not grow out of any examination of ours.

Col. Dyer: Q. Now, this letter of January 19th, that Judge Krum asked you about, as I understand you, you say you signed that letter? A. That is my signature.

Q. Did you dictate that letter? A. I cannot say.

Q. Is there any expression in that letter that you believed is yours and not an expression of Senator Burton's? A. There is nothing in that letter that particularly calls my attention to it as being mine. You see, Colonel, it is in this way—

Col. Dyer: I don't care for any explanation. This is the letter that Judge Krum hands him and asks him if he wrote. It is the one of Jan. 19th, and is the one that has not been read in evidence, because your Honor excluded it.

Judge Krum: If it does not go in evidence, it is wholly immaterial.

The Court: There is no claim, as I understand it, that the defendant disavows the authorship of these letters. These questions are asked to show how the business was conducted.

Mr. Lehmann: And how much stress might be laid on a mere turn of verbal expression. Here is a man writing hundreds of letters a day.
299 The Court: I do not think there is much importance attached to it.

Judge Krum: I offer in evidence the record of the case on trial, showing the appearance of the defendant, on Jan. 27, 1904. I offer the record of that date, of the waiving of the

reading of the indictment, entry of plea of not guilty and the order of the court for the appearance of the defendant March 7, 1904, and the further entry of the order of Feb. 9, 1904, to appear on March 22, instead of March 7th.

I offer the files of the case in so far as to show that no capias was ever issued for the apprehension of the defendant.

The Court: Q. What is the purpose of that?

Judge Krum: To show that he appeared here voluntarily that no capias was issued and no arrest made and that he voluntarily waived his privilege as a Senator.

The Court: The record shows these facts and if agreeable to counsel, these facts will be understood without reading through the record. It was so agreed.

Joseph Ralph Burton the defendant, being first duly sworn, testified as follows:

Direct Examination

By Judge Krum:

Q. What is your name? A. J. R. Burton.

Q. How old are you, Senator? A. I am 53 past.

Q. When were you qualified as a Senator of the United States? A. On the 4th of March, 1901.

Q. From what state? A. From the state of Kansas.

Q. Without undertaking to go into the details of the conversation between you and Mr. Harlan on the occasion that he has described, I will get you to indicate to the jury whether in the main and substantially his statement as to what occurred and agreed on and arranged for is correct? A. It is
300 substantially correct. That is, the arrangement that was made on the train between here and Chicago. There are one or two matters that I do not think he mentioned just as as I remember them.

Q. Then in that regard, as briefly as possible, indicate what occurred? A. The fore part of the conversation was, as he said, directed to the criminal prosecution that he expected would be brought against Dennis; and when the question of my employment beside the defense of that case, was the main subject of discussion, and it became apparent that he wanted me as counsel for the Rialto Grain and Securities Company as well as to help in that case or any cases affecting Major Dennis, and I think this is the language that was used. I said "Now, Mr. Harlan, let me understand you. I am a senator. This company is using the mails extensively. Is it contemplated in any way that I am expected to use any influence in the department directly or indirectly". His answer was quite emphatic he said "No, senator, we do not want any influence in the deparement. This company has been organized

under the direction of myself and Judge Krum, it is violating no law, it does not intend to violate any law, and we do not want any influence in the department at all". That is as nearly as I can recall the language.

Q. Was there any other item of conference or agreement which Mr. Harlan has not given as fully as you remember, or as you remember it? A. I do not think Mr. Harlan or Mr. Kastor either has made it clear that both of those gentlemen at length—and especially Mr. Harlan explained to me their estimation of Major Dennis.

Q. We do not care so much about that, Senator, as the details of the agreement, whatever they were, and whatever limitations were put upon them? A. There were no
301 limitations, except as he has explained, the salary was to be $500 a month, as he has given it. I want to say here, that it is very hard for me or anyone to explain the optimism of Mr. Harlan with regard to the securities feature of the Company as he explained it that day. It will be born in mind that bonds, stocks and everything was on the increase at that time.

[—] Is it a fact that feature of the business, or proposed business of the Securities company was large- [dwely] upon by Mr. Harlan in his conversation with you? A. It was, yes sir. He also told me that the company had leased an elevator in St. Louis, contemplated leasing other elevators, and expected to carry in the grain business a large quantity of corn, somewhat similar to what a bank does in carrying a currency reserve.

Q. How soon after that interview did you reach Washington? A. I reached Washington on the 19th day of November.

Q. When, before that, had you last been in Washington? A. I left Washington on the 5th day of July, of that same year, and spoke in Topeka, Kansas, on the 7th, sailed for the Sandwich Islands on the 14th of August, returning and landing in San Francisco on the 6th of October, went into the campaign, and from the time I left Washington on the 5th of July, I was not back there any more until the 19th day of November.

Q. Now, you have heard the statement of Mr. Cochran, with reference to the earliest of your calls at his office. What was your recollection in regard to that? A. I called there first on the 20th day of November.

Q. Had you been there previously to that at any time between the time when you left Washington at the close of the session and the occasion of this visit that you indicate? A. I had not. I had not even been in the city.

302 Q. State what occurred—or, in the first place, for what purpose or for what purposes did you go to the Post Office department on the 20th of November? A. I had received a letter from Mr. Harlan—

Q. Pardon me, is this the letter, the one of the 18th of November? A. Yes, sir. That is, no sir, this is not the original.

Q. The letter of which that is a copy? A. I take it
303 that is a copy, without reading it all over.

Q. Here is the original? A. (referring to paper) Yes, that is the letter.

Q. Now, you had received that letter? A. Yes sir.

Q. On receipt of it, what did you do? A. I went to Mr. Cochran's office.

Q. What inquiry did you make, as you recall? A. I asked him if he had any information—I cannot remember the exact words, but whether he knew if Mr. Dennis had been indicted, or if it had been determined to indict him, and said to him "if he is indicted I expect to help defend him." And I think his answer was that he knew nothing about it.

Q. Now, in what connection was any information afforded you in regard to this so-called complaint of Mrs. Evans or Mrs. Hout? A. I cannot remember the exact words, or how we got at the subject, but to the best of my recollection I explained to Mr. Cochran that Mr. Dennis owned the Rialto Grain & Securities Company, and I asked him if there were any complaints,—if he knew anything about that company was my first question, and he said he did not know anything about the company; and I asked him if there were any complaints against the company.

Q. Right there, Senator, what was your purpose in making that inquiry of Cochran with reference to any complaints concerning the Rialto Grain and Securities company; state to the jury what your purpose in that respect was? A. I had been employed as counsel for the company. That I had this letter from Mr. Harlan (referring to letter of Nov. 18), telling me that the tentative employment he had made with me had been ratified by the company. I had been advised that Maj.
Dennis had had trouble with the Brook Brokerage com-
304 pany. As I say, I went there to ask about that. Both Mr. Kastor and Mr. Harlan had assured me that whatever irregularities there were in that company, it was not the fa-lt of Maj. Dennis. I knew Judge Krum and Mr. Harlan were the attorneys of this company, but being advised that far, I wanted to satisfy myself with respect to the standing of this company in the department. That was the motive of the inquiry.

Q. In response to your inquiry about complaints, what did you receive from Mr. Cochran? A. Mr. Cochran was sitting, as I remember it, next to the window; his room is rather a long, narrow one; he got up and went across to the fore part of the room, if I recollect rightly, and looked at a record, and came back and said to me that there had been two complaints

made or filed "last month", as I understood him, and that they had been sent out to the inspector in charge in St. Louis. And he gave me the names Bells Evans and Mrs. Hout, of Albany, New York and I made that little entry there at the time.

Q. At the time of the interview betweeen Mr. Harland and yourself, in which the details of your employment were arranged, was there any indication given to you that there had been any complaint made against the Rialto Grain and Securities Company? A. No sir, Mr. Harlan said to me that there was absolutely nothing against the company, and he said, "if you do not believe it, go and inquire yourself".

Q. So is it a fact that it was on this occasion that you first learned there was any such thing as a complaint against the company? A. Yes sir.

Q. Did you see the Evans letter? A. No sir, I did not and I did not ask to see them?

Q. Was the interview between yourself and Mr. Cochran limited to this?—or did anything further take place, as
305 you recall? A. I had previously told Mr. Cochran, as I stated, that if Maj. Dennis was indicted in the other matter that I expected to help defend him, and then I said to him: "Now, Cochran, I am the counsel for the Rialto Grain and Securities Company. Major Dennis owns the company. He is a stranger to me. I have been assured that the company is organized and its methods are all right. But I do not know, and if anything comes into the department that puts you upon inquiry, any complaints or anything of the kind, I wish you would advise me, because, notwithstanding I am counsel for the company, I am not its counsel here. I cannot be retained under any circumstances to appear in the departmen as a paid attorney."

Q. Now, Senator, at that time did you— A. But there is one more expression I omitted there. I said "Another thing, Mr. Cochran, in case that it should become necessary to recommend summary action on any complaint, disregard my request entirely; because I won't answer any of these complaints and I won't remain attorney of the company or counsel for the company, if it has any trouble with the department."

Q. On that occasion, Senator, did you, by any word you recall, or anything you did, indicate to Mr. Cochran any purpose on your part to interfere in any way with any of the processes of the Post Office department, or to lead him—did you on that occasion attempt to lead him to withhold or abstain from any action that might be found necessary on his part, or on the part of any other officer in the department? A. Not at all.

Q. Have you now substantially given us what occurred on this first occasion? A. Yes, as I remember it.

Q. When, Senator, did you go to the Post Office department the second time? A. Well, with reference to what, Judge?

A. I mean with reference to any of these matters that
306 have been inquired of here? A. I do not remember the date.

Q. Is there anything in any of these letters that will assist you in that direction? A. I have no independent recollection of the date, but the letter is on the 9th of December.

Q. It was of course before the 9th of December, the letter having been written on that day, that you went there? A. Yes, sir.

Q. To which office did you go? A. I went to Mr. Cochran's office, and my recollection is, showed him that letter of, I think it is, December [2rd].

Q. The letter of Mr. Harlan? A. Yes, sir, the letter of Mr. Harlan. Going back a moment, Judge, and looking at this letter of November 20, I think there was some talk between Mr. Cochran and myself, I cannot remember the words, about the custom of hearings on complaints; that is, if complaints were made, unless it was a very aggravated case or required summary action, the parties were always notified and always heard.

Q. That was on the occasion of this first talk you had with him? A. Yes sir.

Q. Now, with reference to that letter of the 9th, of December, about when was it you went to the office of Mr. Cochran? A. Well, I can only give my best recollection that it was on the 9th.

Q. With reference to what did you go there then? A. Hand me that bunch of letters, or give me the letter of Dec. 3rd.

Q. This is the one, signed by Harlan? A. Yes. When I received this letter, the next time I was at the office, in making the rounds of departmental calls some weeks afterwards,
307 I suppose it was, my recollection is that I showed Mr. Cochran this letter, and I did it for the purpose of advising him with reference to this man whom Harlan thought was a fraud or the men. Mr. Cochran said at once "there is no such inspector as Bowman"; that he would like to catch him, and spoke about the other man being a fraud, and I think he then said "There is nothing in this office here against this company in any shape, manner or form, or no instructions gone out", or something, I don't remember.

I could only infer from my letter—

Q. Your best recollection then, is, that this call at the office of Cochran was on the 9th of December? A. That is my recollection.

Q. Did you have any other purpose in going there, or did you indicate to him any other purpose on your part in going there,

than to inquire with reference to two persons named in this letter? A. Nothing at all. And if there is any other statement made, it was volunteered, that was the purpose of my inquiry, and I was there for a moment. I remember very well being there, but, as I say, I cannot say positively it was the ninth.

Q. It appears from the evidence introduced here, that even earlier than the 18th of November there had been filed a complaint, as it is called, of F. R. Fravel. Do you recall any information given to you with reference to any such complaint, on the occasion of your first visit? A. I never heard that there was any complaint against the Rialto Grain and Securities company until after I was indicted, except these two first that were mentioned to me on my first visit.

Q. That will cover the whole thing, Senator. When did you go, if at all, to the office—

308 A. I want to add, if you will allow me, that when I got Mr. Harlan's letter telling me those two cases had been examined and reported nothing in them, or substantially that, I never gave the matter another thought. And speaking in regard to these jackets, I never heard of a jacket until Col. Dyer commenced speaking of it the other day, except once, and that is since I have been indicted and when I was trying to find out in Washington if there were any other complaints against this company.

Q. When, after the 9th of December, did you go to the office of the chief inspector? A. I called there with Maj. Dennis on the 15th day of December.

Q. What was your purpose in going there at that time? A. Maj. Dennis had come on to Washington and brought a copy of his indictment, and a statement of the facts, or purported facts, prepared by yourself and Mr. Harlan. I had spent the evening with him before, and the forenoon of the 15th, and had given him my opinion respecting the case, upon the facts stated. We took a carriage and drove to my office from the New Willard hotel. Maj. Dennis was urging me, after I gave him the opinion, to come back to St. Louis with him. I tried to dissuade him; that it was not necessary—shall I tell what was said there?

Q. No, it is not necessary to go into that at all. A. After we got there Maj. Dennis wanted to make a draft—

Col. Dyer: I don't know what we have to do with all those particulars.

Judge Krum: Q. Come to the interview in the office.

A. We were driving by the office, and I suggested that we make a call on the 4th assistant Post Master General

309 merely to pay our respects.

Q. Did you go to his office? A. We went to his office; he was not in; we waited a few minutes, and then we left his office and went down the winding stairway there. I suggested that we go down that way and make a call at Mr. Cochran's office.

Q. What occurred at Mr. Cochran's office? A. I think it is about as he told it.

Q. You introduced Maj. Dennis to him? A. Yes, I introduced Dennis and I heard some talk there about Dennis' middle name being Cochran, and they talked about family matters.

Q. Your recollection of what occurred is substantially as Mr. Cochran indicated? A. Well, sir, I don't remember anything different, unless it was, unless I said to him something about being Maj. Dennis' attorney.

Q. Unless it is materially different, it is not necessary. A. As he gave it, it is substantially correct.

Q. On that occasion, Senator, did you ever have any other purpose in going to Mr. Cochran's office than to merely present Maj. Dennis? A. No sir, we were driving back from my office to the bank.

Q. That was your purpose in going. Then when did you next go to the office? A. I think it was on the occasion of January 24. Let me see those telegrams and I can tell you (referring to telegrams). No, I haven't any. It was the occasion that he testified about when I went with reference to the records and books of the Brooks Brokerage company.

Q. Was that all that was referred to or discussed on that occasion? A. Yes sir, that was all. There was nothing else talked about.

310 Q. Was your purpose in going there limited to an inquiry or action in regard to the Brooks Brokerage Company? A. Entirely so, yes sir.

Q. Now, when did you go to the office of Cochran again? A. With reference to the Rialto Grain and Securities company? or any matter connected with it?

Q. Yes. A. I don't think—I do not now recall that I was ever there again, although I would not be positive about that Judge. I have tried to think of these mattters as carefully as I could, but departmental calls are so many and varied that it is very hard to do it.

Q. On the occasion of the 5th of February, where did that interview take place? A. At my office,—if you will give me those letters and telegrams, I can tell you. (referring to papers) I received this telegram; I do not remember whether it is in evidence or not.

Judge Krum: In connnection with the Senator's testimony, I will read the telegram, dated St. Louis, Feb. 5, 1903, addressed to J. R. Burton.

Which telegram is in words and figures as follows, to wit: (Counsel reads)

"Feb. 5, 1903, St. Louis, Mo.

"To the Honorable J. R. Burton, Senate Annex, Washing "ton, D. C. Dice delivered our books to State authorities, "where they are held subject to his order. Get order requiring "him to deliver to us. Col. Dyer told me he had no further "use for them".

Q. Now, to what books did that telegram refer? A. To the same books and records.

311 Q. You mean the books of the Brooks Brokerage company? A. Yes sir. They were books that I had been advised had been voluntarily turned over to the authorities in the trial of Maj. Dennis.

Q. How did Mr. Cochran happen to visit your office, Senator? A. Just as he detailed. I asked Col. Smith, my Secretary, to invite him there, and whether he 'phoned or went, I do not remember.

Q. With reference to that interview, has Mr. Cochran substantially stated all that occurred? A. Well, he stated something of it, but he didn't state it substantially. I think he was very much mistaken in one part of it.

Q. With reference to that, what part was that. I showed him this telegram, and he expressed surprise at that part of it which said "Col. Dyer told me he had no further use for them", and said he would look into the matter at once. I told him that I knew nothing about the matter further than he did, but that if Mr. Dice, or Col. Dyer or the Government or anybody connnected with the government, wanted to keep these books, there was no objection, as far as I knew, and if there was, I would not urge any objection. But, unless he could give me some reason why they should be turned over to the State authorities, it would seem that that was not fair and right. He said he would look into it. We then branched off to something of a personal talk, as I remember. Mr. Cochran is from my state, and I knew that he knew of my history. I talked to him about being counsel for this company. I cannot remember just what I said, but reiterated what I had said to him in the first instance that— I am a little ahead there. I told him the employment had come to me, I was very glad to get it—

312 Q. He went over those matters, Senator, and I do not think it is necessary for you to do so. A. I want to call especial atttention to one part of the conversation.

Q. I was going to call your attention to that myself. As I recall it, Cochran stated you made some remark about a desire to practice in the department, or to establish a practice in the department. I will get you to indicate to the jury

whether that is the remark that you made, or, if it is not, what you did say? A. Oh, no.

Q. There is no occasion to consume time with much detail about it, but just let the jury understand generally what your recollection about that is? A. I called attention to the fact that men like Senators Edmunds and Conkling had built up a good practice while they were senators in the courts and as counsel, and in a small way I wanted to imitate them—because he knew my financial condition, that in the panic and the long years after that had followed, I had lost my fortune; and I said "Now Cochran, I am counsel for the company, for a company that has to do with the mails, and I want you to be particular and advise me if you see at any time any wrong doing on the part of that company. Notwithstanding I am not the conservator of the morals of my client, I cannot afford, and will not be their counsel if they have any trouble with the department.

Q. The important part is your seeking to establish a practice in the department. Did you ever at any time undertake anything of that sort? A. Not for one moment, at any time since I have been senator.

Q. As I understand you, after the 22nd of January, or thereabouts, you were not in the office of Mr. Cochran at
313 all? A. Not that I recollect; I think it was the 24th or 25th.

Q. Along about there? A. Yes.

Q. I will get you to indicate to the jury whether, at any time, either to Mr. Cochran as chief inspector of the Post Office department, to the Post Master General, to the 4th assistant Post Master General, or to the Assistant Attorney General for the Post Office department, you ever said anything or ever did anything in the presence of either of them, to indicate a purpose on your part, to influence them at all with reference to any proposed action in regard to the Rialto Grain and Securities company in that department? A. Absolutely none whatever—and I do not think any officer of the Government would say so.

Q. Never mind that, Senator. When were you advised of the fact of your indictment? A. On the afternoon of the 23rd of January last.

Q. Have you had any information from any source that there were any inquiries here, or anywhere else, in reference to your connection with the Rialto Grain and Securities company with regard to the Post Office department? A. None whatever.

Q. From what source did you get your information first? A. Well, I think the Associated Press man brought down a

short dispatch and in a few minutes afterwards I received a message from you.

Q. Do you remember about what time in the day you got my message? A. Well, not certainly but between 3 and 4 o'clock.

Q. Now, how soon after that did you leave Washington for St. Louis, with reference to your appearance here? A. I left in about 24 hours?

Q. Did you come to St. Louis as speedily as possible?
314 A. Yes sir, there was but one train I could have come on sooner.

Q. And when did you get here? A. We were delayed about 22 or 23 hours, and I think arrived on Tuesday afternoon, leaving there on Sunday.

Q. Detained by what? A. Detained by a snow storm.

Q. And how soon after your arrival here did you enter your appearance in court here? A. The next morning.

Q. Now, going back to other matters, Senator, do you recall the conference that Mr. Harlan, yourself and myself had with reference to the indictment against Maj. Dennis, in the office of the Rialto Grain and Securities company on 4th and Olive Streets, in this city? A. Yes sir very well.

Q. On what day was that? A. I think it was the 23rd or 24th of December.

Q. The 24th of December? A. The 23rd or 24th; I think it was the 24th.

Q. The 24th of December, 1903? A. Yes sir.

Q. Do you recall whether Mr. Mahaney was present at that conference? A. I think he went over with us from the Planters' hotel, and then he was in and out. We stayed there until very late that night.

Q. You heard his statement, didn't you, as to the suggestion which he says was made, under which it was arranged that you were not to appear here in that case because of the possibility of creating a difference with Mr. Dice; I will get you to state to the jury whether any such statement as that was made by anybody, or any such suggestion as that afforded from any source? A. Oh, no sir, there was nothing of that kind talked about.

Q. In the month of March, 1903, who terminated the
315 engagement between yourself and the company? A. I did.

Q. Mr. Mahaney as representing the company, or yourself? A. Oh, I terminated it myself.

Q. It was, then, at your suggestion and request that the employment ceased? A. Yes sir.

Q. A statement was made here by Mr. Mahaney, that you requested him to destroy certain letters. What have you to

say with reference to that, to the jury? A. Oh, there was nothing said about destroying letters.

Q. Did you make any such request as that of him. A. Not at all, not at all.

Q. On that occasion, did you see any such letters as he referred to? A. No sir.

Q. Did those letters that Mr. Harlan turned over to you have anything to do with this controversy or anything connected with it? A. Do you mean all his letters?

Q. No sir, I mean those two letters which he says he gave to you, and which you told him afterwards you had destroyed? A. They had absolutely nothing to do, nor was there anything in them that referred in any way to this matter. It was on another subject entirely. I want to state right here, that this letter here of the 20th, and this letter of December 9th, and I think, another one, or whatever letters you had, that Mr. Harlan turned over to you, were turned over to me and I took them to the Southern hotel and had them for 24 hours in my possession.

Q. And then you turned them over to me? A. Yes sir.

Q. I am referring to the two letters which Mr. Harlan said he turned over to you and you afterwards destroyed. Those letters had no connection with this case at all? A. None at all, sir.

316 Q. Did you preserve letters-press copies of the letters you wrote to Mr. Mahaney? A. I cannot say that I did all of them. Until quite recently we only took partial copies. I will explain about that: My stenographer is not rapid, and as far as I can tell, there are some letters that I do not seem to have copies of. That is, at least one or two. But in the main I did. I also want to explain that I do not keep all my letters. We get about 100 a day, and we frequently destroy them.

Q. I will get you to indicate, in a general way, what the course of senators, is in Washington, as you have observed, and what is your own course, in regard to calling at the departments, or responding to inquiries, or requests for inquiries in any of the departments? A. Departmental work is almost half the labor of a senator.

Q. Does he look after such things himself personally or— A. Both ways. Through his secretary and his other help he may have, and, personally as well. I am relieved entirely of the pension work as to myself. I do not think I have seen the pension office for two years.

Q. What do you mean by "pension" work; is that merely inquiring, going to the pension office and making inquiries in response to letters sent, and all that sort of thing? A. Yes, and a great deal more than that. Col. Smith is a lawyer and was a soldier and is very competent and I look upon him as a pension expert. He is very much more familiar with it than I am, and he attends to it all.

Q. He goes there simply for information? A. Oh, yes. I have never gone to a department at any time for hire. Never thought of such a thing.

Q. I will get you to state to the jury whether you received in the month of November, the first payment that was
317 made you by the Rialto Grain and Securities company with the understanding on your part, or with the intent on your part, to accept it as compensation for any service which you had rendered in the post office department for the Rialto Grain and Securities Company in a matter in which the United States was interested? A. On the contrary, I did not suppose there was any matter there at all when the check arrived.

Q. Now, what have you to say with reference to the second payment which was made to you by Maj. Dennis in person in the city of Washington: did you receive that payment as compensation for services which you had rendered the company in any matter that I have indicated? A. Oh no, sir I did not.

Q. How was it with reference to the payment in the month of January, was it the same? A. The same, yes sir.

Q. And the payment in the month of February, the same? A. The same, yes sir.

Q. The payment in the month of March made here in St. Louis? A. The same, yes sir.

Judge Krum: Now—if your Honor will indulge me, perhaps for seeking or undertaking to enlarge upon a matter which has been rather fully covered—and yet I feel we ought to go into it a little further.

Q. Going back to the conference between yourself and Mr. Harlan in regard to the scope of the business of the Rialto Grain and Securities company, and calling attention to the feature of placing securities, I will get you to state to the jury your recollection—of course—briefly—of what Mr. Harlan indicated in that regard; what did he have to say about that feature of the business of the company? A. Mr. Harlan was very much exercised about the idea that Maj. Dennis' Indictment
318 might affect the business—

Q. Pardon me; perhaps I can call your attention directly to what I am driving at myself. What indication, if any was given to you as to any purpose that you might serve

at Washington or elsewhere in regard to this matter of placing securities? A. Well, as I have said, I thought I was wanted just then in the criminal case, and just then, for the benefit of my name as counsel for the company, and then as the securities feature was already to take hold of, that I should try to make myself familiar with securities that could be obtained. Following that up, I made a trip to New York early after I was engaged. I also took the matter up with Senator W. A. Clark of Montana, whom I regarded as an authority. But of course those plans of the company failed.

Q. In the talk between Mr. Harlan and yourself, what did he indicate that they would look to you for in that matter of placing securities? A. They specially said, when they reached that point, that they would want me to get in touch with the trusts companies.

Q. As I understand it, this matter was dwelt on very largely by Mr. Harlan? A. It was dwelt on very largely at the time the contract was made, but nothing substantially was done about it.

(No cross-examination.)

Judge Krum: I desire to say, your Honor, that ordinarily I would not undertake to testify in this case, but in my opinion it is necessary for me to do so.

Chester M. Krum of lawful age, being duly sworn, in
319 behalf of the defendant testified as follows:

Direct Examination

By Mr. Fred Lehmann:

Q. [Q.] Your name is Chester H. Krum, and you are a member of the bar of this city? A. Yes, sir.

Q. You were of counsel for Hugh C. Dennis, in the matter of the indictment heretofore pending against him in this court? A. Yes sir.

Q. Your associates in that matter were Mr. Harlan and Senator Burton? A. Yes sir.

Q. I call you- attention to a conference which was testified to by Mr. Mahaney, held I believe at the Planters House? A. No, not at the Planters House, at the office of the Rialto Grain & Securities Company.

Q. Wherever it may have been? A. Yes sir.

Q. And to his statement that while you and the others named were there, the question of Senator Burton's appearance in court in that case was under discussion, and that it was stated by some one that he ought not to appear, lest his appearance might prejudice, or arouse antagonism on the part of the Inspector Dice? A. Yes, sir.

Q. [Q] What is the fact as to any statement of that kind having been made at that interview, or any other at which you were present, by anybody? A. The fact is, that all the suggestions that were made, and all the directions that were given, on that occasion, were made and given by myself. I arrogated the right to absolutely direct what should be done in that case. And, accordingly, I stated that in my judgment Senator Burton ought not to appear in court, for the reason that it would look, I thought, like overloading the case with lawyers. That if there was any one man who knew anything about section 5480 of the Revised Statutes of the United States, it was myself.
320 That I had not only cut my eye teeth on that Statute, but every tooth I had. That was the idea conveyed. And I, nor anyone else, at that interview, never made the slightest suggestion that Senator Burton was not to appear here, because of any friction, or possible friction, between him and Inspector Dice, or any body else.

Q. Was Inspector Dice's name involved in that connection? A. Not at all, sir, no, sir.

Defendant Rests.

Court here took an adjournment till Saturday, March 26, 190, at ten o'clock A. M.

Saturday, March 26, 10.00 A. M.

Court reconvened, in pursuance to the foregoing adjournment.

Col. Dyer: It is admitted by the defendant that his two letters, one bearing date January 19, 1903, and the other bearing date February, 11, 1903, were never in the possession of Judge Krum or the defendant after they were written, or of Mr. Harlan at any time.

Judge Krum: The admission goes to the extent that those two letters were not among those that I practically turned over to Col. Dyer.

W. J. Vickery, recalled for further direct examination by Col. Dyer, having been heretofore duly sworn, testified as follows:

Col. Dyer: Q. You heard the testimony of W. W. Smith? A. Yes sir.

321 Q.—in which he said "When the Senator got through, Mr. Cochran said 'well, Senator, I will make one statement; "'You did say that you were not employed to go to the "'department by anybody, and that you could not be employed "'to go to the department for anybody, for pay or against "'the Government.'" I will ask you to state whether or not any such statement was made in that interview?

Judge Krum: I object as not competent by way of rebuttal, for the reason that the Government undertook to show by this witness what occurred and what was said in full upon the occasion referred to, and elicited the testimony from [—] to that effect, and this is now not testimony in rebuttal.

Objection overruled. To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Q. (Last question read) A. No such statement was made in that interview.

Cross-Examination

By Judge Krum:

Q. What was said on that subject? [—] As I gave yesterday—or the day before—my recollection is covered in that: that Senator Burton protested to Mr. Cochran that he had a number of times made the statement that he did not desire to antagonize the department.

Q. You mean to say that Mr. Cochran did not make any statement at all? A. I think I said in my testimony that as I recollected Mr. Cochran said he could make no statement, at that time, and that Senator Burton, said he did not desire to antagonize the department.

322 Judge Krum: That is, you have given your recollection of what this occurrence was, and Col. Smith has given his. That is all.

Which was all of the evidence introduced at the hearing of said cause, as aforesaid.

Thereupon the defendant asked the court as to each count of the indictment to direct the jury to return a verdict of not guilty which the Court refused as to each of said counts to which ruling as to each of said counts the defendant then and there duly excepted.

Thereupon the Court charged the jury as follows:

323 Gentlemen of the Jury:

You have patiently given attention to the evidence and argument of counsel in the case which is now about to be submitted to your final determination.

The case is important because the accused is a man occupying a high and honorable position in the public service, whose reputation and usefulness may be seriously affected by your verdict. The case is important too, because it involves an alleged violation of the law, intended to promote the public welfare, and secure efficiency in the public service.

In approaching a final consideration of the case, you should bear in mind that the law, and the courts of the land organized to administer it, are not and cannot be any respecters of persons. The high and the low, the weak and the powerful must alike be subject to their behests.

Approach a final consideration of this case, therefore, with becoming gravity, and allow but one purpose to actuate your conduct, and that is to determine justly and fairly, as impartial and honest jurors, the issues now to be submitted to you.

The indictment against the accused in this case is founded upon Section 1782 of the Revised [States] of the United States, which is as follows:

"No Senator, Representative, or Delegate after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, Bureau, officer, or any civil, military, or naval commission whatever."

324 You will observe from the reading of this statute that a Senator of the United States (among other persons and officers mentioned in the act) is prohibited from receiving any compensation whatever, directly or indirectly for any services rendered or to be rendered before any Department of the Government, to any person in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or in which the United States is directly or indirectly interested. The reason of this prohibition is: to promote integrity and efficiency in the discharge of official duties, and to maintain proper discipline in the public service.

To permit a Senator of the United States, whose influence, by reason of the high position he holds, is naturally persuasive and weighty with executive officers, to take compensation from persons for services rendered such persons before an executive department, would it was thought, create a duty in favor of such persons arising from the implied obligation of fidelity to the client, from whom he should accept a fee, inconsistent with those relations of "ready confidence, and entire unreserve", which ought to exist between the legislative and executive departments of the Government in the promotion of the public weal, and in the enforcement of the laws of the land.

As you are doubtless aware the post-office department is one of the great executive subdivisions of the government, established by the congress for the purpose of aiding the President of the United States in the discharge of his executive duties in mattters relating to the postal service.

A chief officer called the Postmaster General, who by law is made the head of the department, is placed in charge of it and power is expressly conferred upon him by law, upon evidence satisfactory to him that any person or company is engaged in conducting any scheme or device for obtaining money or property of any kind, through the mails of the United
325 States, by means of false or fraudulent pretenses, representations or promises, to instruct any postmaster, wherever they may be located throughout the country, who may receive at their post-offices any letters directed to any such persons or company, to return such letters to the postmaster at whose post-office such letters may have been mailed with the word "Fraudulent" plainly written or stamped on the outside thereof, to be by him delivered back to the writers thereof.

It is thus seen that power is given to the Postmaster General to investigate by any means within his power, whether any person or company is making fraudulent use of the mails as just alluded to, and when he becomes satisfied by such evidence as he may secure of such fraudulent use, he has the authority under the law to put a stop to such use, in the way and manner already stated.

The purpose of this law is obvious; the facilities of the United States mail service are intended to subserve the honest purpose, whether social or business of the public, and not to subserve the fraudulent purposes of any member of the community.

To more effectually accomplish this purpose Congress, passed the Act known as Section 5480 of the Revised Statutes. This is a criminal statute, which provides in substance: That if any person devises a scheme or artifice to defraud, by means of the Post-Office establishment, and actually mails any letter, book, writing, circular, pamphlet or advertisement, or takes or receives any such letter or other article just mentioned from the mails of the United States, by way of executing such scheme or artifice to defraud, such person shall be guilty of an offense, and punished as in the section specified.

Enough has been pointed out by these provisions of the law to clearly show that congress has made substantial provisions for the enforcement of the postal laws of the United States, and has imposed upon the Postmaster General, as the head of the

Post-Office Department, the authority under certain circumstances to make an initial inquiry with reference to the fraudulent use of the mails.

While this duty is being discharged, and the initial
326 inquiry is being made by the Post-Office Department, with a view of ascertaining and determining what action the Postmaster shall take in a given case, that is: whether he shall prohibit the use of the mails, and require letters to be stamped "Fraudulent" in the way and manner which I have already explained, the law prohibits any Senator, Representative, Delegate, head of department, or other officer or clerk in the employ of the governmnt from taking any compensation whatever for services rendered or to be rendered before the Department to any person in the matter of such inquiry.

The Grand Jury of this District has found an indictment against the accused in this case, which charges him with having violated the provisions of Section 1782 of the Revised Statutes, already read to you.

The first five counts of the indictment relate, generally speaking, to one transaction, and present five different phases of that transaction.

The first count charges in substance that the accused on or about March 26, 1903, while a Senator of the United States, received, at St. Louis, Missouri, the sum of Five Hundred Dollars, from the Rialto Grain & Securities Company, for services theretofore, between November 22, 1902, and March 26, 1903, rendered by him to that company before the Post-Office Department, in a matter there pending in which the United States was directly interested, namely; whether that company had so violated the laws to which I have already called your attention as to require the Postmaster General, in the exercise of his duty, to stop the use of the mails by that company, and to cause letters sent to it by mail to be stamped "Fraudulent" and returned to the writers, as set out in said count.

The services alleged in said count, and in all the counts of the indictment to have been so rendered, consist of visits to the Postmaster General, the Chief Post-Office Inspector and other officers of the Post-Office Department, and of representations and statements made to them with a view, and for the purpose of inducing such officers to decide the question pending
327 before the Department in a manner favorable to the Rialto Grain & Securities Company.

The second count is practically the same as the first. It charges that the accused received at St. Louis, Missouri, the

sum of Five Hundred Dollars from the Rialto Grain & Securities Company, on March 26, 1903, for services rendered that company before the Post-Office Department in the same matter as stated in the first count, with this change only, that the United States was indirectly interested in the matter, instead of directly, as charged in the first count.

The third count is the same as the first, except that it charges that the accused received the Five Hundred Dollars on March 26, 1903, from W. D. Mahaney, an officer and employee of the Rialto Grain & Securities Company, instead of from the company itself, as charged in the first count.

The fourth and fifth counts have been disposed of by an entry of a nolle prosequi by the government, and you need give no attention to them.

Before advising you explicitly concerning the first, second and third counts of the indictment, it seems best to explain generally that section 1782 of the Revised Statutes, under the provisions of which this indictment was found, prohibits the receipt of compensation by a Senator of the United States, (among other officers) for services rendered before a Department in a matter or thing in which the United States is directly or indirectly interested.

It is doubtless by reason of this phraseology of the act, that the pleader in preparing the indictment made the two charges as found in the first and second counts; in the one (the first) charging that the United States was directly interested, and the other, (the second) charging that the United States was indirectly interested in the matter or thing pending before the department in relation to which the services were charged to have been rendered.

With respect to this feature of the indictment, and to the statute relating to the "interest" of the United States, in matters pending before the Post-Office Department, the court declares the law to be: That the United States within the true meaning of Section 1782 was interested, both directly
328 and indirectly, in the determination of the question, if such question was pending before the department, whether the Rialto Grain & Securities Company was so violating the law as to require the Postmaster General in the performance of his duty, under the law, to stop its use of the mails, and to stamp its letters "Fraudulent" in the way and manner already stated, and as fully set forth in the indictment.

The United States owed the duty to all its citizens to see to it that the law was faithfully enforced, and it was interested in the highest legal sense of the term, within the true meaning of the Act of Section 1782, both directly and indirectly, in the question whether the law was so being violated by the Rialto Grain & Securities Company, as to authorize or require its executive officer, the Postmaster General to exercise the power conferred upon him, and perform the duty imposed upon him by the law.

In determining whether the matter or thing charged in the several counts of the indictment was so before the Department, "or pending before the department" as charged in the indictment, the court charges you that the inquiry by the Post-Office Department as to whether the Rialto Grain & Securities Company was violating the postal laws, need not have been the result of a formal proceeding, suit or charge, after notice to the company, as is usual in proceedings in the courts of law, but that the matter was "before the department" or "pending before the department" within the meaning of the law, if the Postmaster General had had the matter called to his attention, whether by written communication or otherwise, and had set on foot, and was then and thereafter conducting, an investigation in the usual way prescribed by the rules and regulation of the Department which have been read to you for the purpose of satisfying himself whether he should exercise the power conferred upon him by the law with regard to the matter.

With these general observations, let us come to a consideration of the particular charges contained in the first, second and third counts of the indictment.

If you find from the evidence before you that the ac-
329 cused was, on or about the 26th day of March, 1903, a Senator of the United States, duly qualified and acting as such, and at that time, while he was so a Senator, there was pending before the Post-Office Department of the United States, an inquiry as to whether the Rialto Grain & Securities Company was so violating the postal laws as set forth in these three counts, with a view and to the end of enabling the Postmaster General to determine whether he should instruct the Postmaster at St. Louis to refuse delivery of mail to the Rialto Grain & Securities Company, and stamp its mail "Fraudulent" and return the same as stated in these counts, and if while such matter was so pending before the Department the accused, knowing that such matter was so pending, accepted and received at St. Louis, Missouri, within this District, from the Rialto Grain & Securities Company, or any of its officers, acting for and in behalf of said company, the sum of Five Hundred Dollars for services, of the kind set forth in the counts, as already stated

by me, theretofore, on any days between November 22, 1902 and March 26, 1903, rendered by him for the company, before the department, in the matter of that inquiry, then it will be your duty to find the defendant guilty as charged in the first and second counts of the indictment, otherwise to find him not guilty on these counts.

The third count wherein it is charged that the accused on March 26, 1903, accepted and received from W. D. Mahaney, an officer and employee of the Rialto Grain & Securities Company, the sum of Five Hundred Dollars, for services rendered the company before the Department, is practically the same as the first count.

It was obviously intended by the pleader for the purpose of informing the accused of the medium through which the money was received from the Rialto Grain & Securities Company, and if there is a verdict of guilty on the first and second counts, there should be no conviction on this third count, because as already stated, it is but another way of charging the same offense as is charged in the first and second counts.

The sixth count of the indictment relates to a transaction different from that involved in the first three counts. This count charges that the accused on or about November 22, 1902, at St. Louis in this District accepted and received a certain check of that date, for the payment of money in the sum of Five Hundred Dollars; that the check was drawn by the Rialto Grain & Securities Company upon the Commonwealth Trust Company of St. Louis, payable to the order of the accused, and by him indorsed, and afterwards paid to him at St. Louis, Missouri, by the said Commonwealth Trust Company, for services of the kind already called to your attention, theretofore rendered by the accused to the Rialto Grain & Securities Company, in a matter then pending before the Post-Office Department, in which the United States was directly interested.

This count then proceeds to set out that the matter so pending before the Post-Office Department was whether the Rialto Grain & Securities Company had been violating the laws of the United States as already explained, that is to say: whether it had so devised a scheme to defraud, contemplating the use of the mail service, and actually making use of the mail service in executing this scheme to defraud in violation of the provisions of section 5480, to which I have already referred, so as to require the Postmaster General in the exercise of the power conferred upon him by law, to direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain & Securities Company any mail, but to return the same with the word

"Fraudulent" stamped thereon, upon any and all letters addressed to the Rialto Grain & Securities Company, and sent through the mails to that company at St. Louis, Missouri.

The elements of the offense charged in this count are the same as those charged in the first and second counts. If you find from the evidence, by the measure of proof which I shall presently state, that the accused, while a Senator of the United States, on or about the 22nd day of November 1902, knowingly *received at St. Louis, Missouri*, the proceeds of the check described in this count, from the Commonwealth Trust Company, as compensation for his services theretofore rendered to the Rialto Grain & Securities Company, of the kind and in the way and manner stated in this count, before the Post-Office
330 Department in the matter so alleged to have been pending before the department, and known by him to have been so pending when he received the money, then your verdict on this sixth count must be guilty, otherwise not guilty.

The Government claims that the compensation referred to in this count was sent to the accused by the Rialto Grain & Securities Company, in the form of a check, drawn by it on the Commonwealth Trust Company, payable to the order of the accused, by mail; that he received the check representing this compensation at Washington, in the District of Columbia, and then and there indorsed the check, deposited it to his own credit in the Rigg's National Bank at Washington; that the last mentioned bank afterwards forwarded the check by and through its correspondents to St. Louis for payment by the Commonwealth Trust Company, upon which it was drawn, and that the Riggs' bank, and its correspondents in all this matter became and were the agents of the accused for securing this money, and when the money called for by the check was finally paid at St. Louis, Missouri, by the trust company, on which it was drawn, it amounted to a payment of that money to the accused at St. Louis, Missouri. This suggests an important feature of the case, for the reason that unless it be true that the accused received the money represented by and paid on this check at St. Louis, this court would have no jurisdiction to try the case.

The Constitution of the United States confers upon the accused in every criminal case the right to be tried by an impartial jury of a state and district wherein the crime shall have been committed.

The receipt of the money is the gist of the crime, charged against the accused, and if he did not receive it in this district, in fact in St. Louis where he is charged to have received it, he is not amenable to the law in this District, and cannot be con-

victed in this court on this sixth count. Accordingly, it becomes your duty to ascertain and find from the evidence, what were the true relations between the accused and the Washington bank, when he deposited the check in question with that bank, and what was the understanding between them
231 as to their respective rights in relation to the check and the proceeds thereof. On this question the court charges you as follows:

If it was the intent and understanding of the Washington bank and the accused at the time the latter deposited the check in question with the former, that the bank should forward the same in the usual course by and through its correspondents to St. Louis, for payment, and that in so doing it, and its correspondents should act only as the agent of the accused for that purpose, then the final payment by the Commonwealth Trust Company at St. Louis, of the check to the correspondents of the Washington bank, would amount in law to a payment in St. Louis as charged in the sixth count, of the amount of the check to the accused. If on the contrary it was the understanding and intent of the Washington bank and the accused at the time the latter deposited the check in question with the former, that the bank should become the purchaser of the check, and should thereafter be the absolute owner thereof, and not act as just indicated, as the agent of the accused in the collection of the check, then the payment at St. Louis by the Commonwealth Trust Company, would amount in law to a payment to the Washington bank and not to the accused. In the latter event no crime would have been committed by the accused in this District, by reason of the check referred to in the sixth count of the indictment.

In order to find the accused guilty on the sixth count, you must find from the evidence, by the same measure of proof as is required in all criminal cases, that the check referred to in the sixth count, was deposited by the accused in the Washington bank, for collection, and that the bank was to act in collecting the same, as the agent of the accused, and not as the owner of the check in question.

In determining this issue, you are at liberty to and should consider all the evidence adduced; the actual transaction as it occurred at the Riggs' bank, where the check was deposited, the check itself and all its endorsements, the rights and privileges where were immediately accorded the accused upon making the deposit, the actual conduct and purpose of the
232 Riggs' bank in forwarding the check to St. Louis for payment, the customary conduct and usage of that bank, and all banks in Washington at the time so far as shown by the

proof. And if from all these facts and all other facts disclosed by the proof, you find that the check in question was in fact deposited by the accused, with the intent and knowledge on his part, as well as on the part of the bank itself, that it should be forwarded to St. Louis for collection for account of the accused, the bank and its correspondents acting as agents for the accused to make such collection, you should find that when the same was actually paid to the last endorser on the check at St. Louis, by the trust company upon which it was drawn, it was in contemplation of law, paid to the accused himself.

If on the contrary you find from the evidence, that the accused and the Riggs' bank at the time of the deposit of the check in question, understood and intended that the bank should become the purchaser of the check and be its absolute owner, then the subsequent forwarding of it to St. Louis for payment was the act of the bank itself, and the final payment of the check by the trust company at St. Louis, was a payment not to the accused, but to the bank and if such is the fact your verdict on the sixth count must be not guilty.

The seventh, eighth and ninth counts of the indictment are similar in all respects to the sixth count, with the exception that in the seventh count the accused is charged with having received a check and the proceeds thereof, dated December 15th, 1902.

And in the eighth count with having received a check and the proceeds thereof, dated January 22, 1903.

And in the ninth count with having received a check and the proceeds thereof, dated February 16, 1903.

The issues with respect to these counts are the same as the issue made by the sixth count with respect to the check therein involved, and the facts to be found by you in determining your verdict on these counts are the same as already stated in discussing the sixth count, except only as to the dates when
333 the compensation is alleged to have been received by the accused, and the principles of law governing your action on these counts as already announced in discussing the sixth count are applicable here, and do not require further statement. You will have the Indictment before you in your retirement and you will be able to distinguish between these counts.

As you have observed during the progress of the trial, one of the sharp issues of fact for you to determine in reaching a verdict on the several counts is: whether the services rendered by the accused for which he received compensation from the

Rialto Grain & Securities Company, were rendered to that company, before the Post-Office Department, or whether they were general professional services rendered that company, by way of advice, counsel or otherwise, in other matters not before the Post-Office Department.

Notwithstanding the fact that the accused was a Senator of the United States he had the legal right, so far as this case is concerned, to practice his profession in any and all of its phases, and to receive compensation therefor in any way and manner, and on any terms as to compensation or otherwise deemed by him best,—except that he could not receive compensation for services rendered before the Post-Office Department, in any matter pending there in which the United States was interested as already explained.

And in fact the law does not prohibit him from merely rendering services in such matters before the Department. The only prohobition in this respect is against receiving compensation for such services, and thereby putting himself into such relations with and under such obligations to the person from whom such compensation is received as are usually created by that act.

In determining whether he received the compensation for the services stated in the indictment to have been rendered before the Department, or whether he received the compensation which he did receive for other services, you have before you the evidence of many witnesses, correspondence between the accused and officers of the Rialto Grain & Securities Company, and all the other facts and circumstances brought out in evidence together with all fair and reasonable inferences which may be drawn from them.

And in determining each and all the other issues of this case, you should also consider all the evidence, facts and circumstances in evidence, as well as all fair and reasonable inferences which may be drawn therefrom.

334 You have patiently listened to all this testimony, have observed the demeanor of the witnesses, have heard the analysis and arguments of faithful counsel, and I do not deem it necessary or advisable to make comment concerning this testimony, except to say that under the provisions of Section 1782, upon which this indictment is found, it is immaterial whether the services if rendered, as charged in the indictment were apparently or really antagonizing, or opposing the government, or whether they were apparently or really in harmony with the interests and purposes of the government. The

law probihits a Senator of the United States from receiving any compensation whatever for any kind of services whatsoever, rendered to any persons before the department, in matters of inquiry, or investigation pending there, like that charged in the indictment.

The gist of the offense denounced by Section 1782, is the receiving of compensation for services therein referred to. As already said the law does not prohibit the mere rendering of services by a Senator before the department, but the intent and meaning of the law obviously is: that if a Senator goes before the department, to render service there to any one, in a matter pending there, in which the United States is interested, he shall be under no obligation inconsistent with his rendering absolutely disinterested services in such matter.

There is evidence before you relevant to the exact terms and stipulations of the original contract of employment of the accused, by the Rialto Grain & Securities Company.

This evidence was admitted, not because that contract was in and of itself an issue in this case, but because it was relevant and material, throwing light upon the real issue, that is: whether any services were rendered by the accused before the department, for which he received compensation.

As stated several times during the progress of the trial, you are not to try or determine in this case, the issue whether the Rialto Grain & Securities Company, was actually engaged in a fraudulent business or not. The issue here involved in that respect is: whether an inquiry or investigation was
335 pending before the Post-Office Department concerning the business of that company, with a view of enabling the Postmaster General to determine whether he should forbid the use of the mails to that company as already explained.

Every defendant in a criminal case is presumed by the law to be innocent. This presumption exists in favor of the accused in this case, and will abide with him, as his sure protection until his guilt is satisfactorily established by the evidence.

From this general principle flow certain other necessary conclusions:

First: The burden of proof of the guilt of the accused rests upon the government.

Second: The government is required to prove his guilt by evidence which satisfies you thereof beyond a "reasonable doubt." By "reasonable doubt" as the words are here used is

meant a doubt for which some good reason based on the evidence, or want of evidence in the case, can be given.

"Speculative impressions or possibilities resting upon mere conjecture, not arising or deducible from the proof or want of proof, or a doubt suggested by the ingenuity of counsel, or by your own ingenuity, or one born of a merciful inclination, to permit the accused to escape the penalty of the law, or one prompted by sympathy for him, or those connected with him, not warranted by the proof, or want of proof, is not what is meant by 'reasonable doubt.'"

Bearing in mind those observations, it becomes your duty to carefully consider the evidence before you, and if as a result of such consideration "you can and do entertain a 'reasonable doubt' as to the guilt of the accused, it will be your duty to give him the benefit of the doubt and acquit him. If on the other hand the whole evidence, when carefully examined and considered, produces in your mind a settled conviction or belief in the guilt of the accused, such a conviction or belief as you would be willing to act upon in the important affairs of your life, you may be said to be free from 'reasonable doubt,' and should accordingly, find a verdict in accordance with that conviction and belief."

336 You are the sole judges of the credibility of the witnesses, who have given evidence in this case, and the weight to be attached to their testimony, but as to the principles of law governing the case, it becomes your duty according to the division of responsibility, which the law has made between the court and jury, to acknowledge my supremacy, and to take every expression or conclusion of law, which I may have announced in this charge, as your controlling guide.

Upon finding a verdict of guilty or not, your duty, gentlemen, is at an end. If the verdict be guilty, the responsibility of fixing the punishment is devolved upon the court. .

You have heard all the evidence, the argument of counsel, and the charge of the court concerning the law of this case, and it now becomes your solemn duty, under the oaths which you have taken, and under the heavy obligation resting upon you as honest men, zealous to perform your full duty in this case, to determine the question of guilt or innocence of the accused, without any fear or favor whatsoever, and thus to make good the promise made by you at the outset of this trial, that you could and would try this case impartially and fairly upon the evidence adduced in court, the instructions as to the law of the case given by the court and upon them alone.

337 The Court: I have been asked by counsel for defendant to give certain declarations here, and while I think they have, in the main, been covered by the charge, yet I will give them to you.

These are abstract propositions of law, which I give in connection with the charge, as perhaps more fully amplifying it. I am willing to give them, inasmuch as they are asked, and they contain general propositions of law.

The Court gave the following instructions requested by counsel for defendant:

1. That whether the defendant can be adjudged guilty upon the indictment depends upon his having received compensation for a service rendered to the Rialto Grain and Securities Company in seeking to prevent the issues of a "fraud order" by the Postmaster General against the company. The service must have been rendered in the Post Office Department before some officer charged with the matter of inquiry, and must have been intended to induce such officer to report favorably upon the matter before him, or to decide some question touching a proposed, or contemplated, "fraud order" favorably to the company. The offense consists in the rendition intentionally of the service indicated and the receipt of compensation knowingly for the service so intentionally rendered. It was the privilege of the defendant, as a Senator of the United States, to make inquiries in the Post Office Department of any of its officers in regard to complaints against the Rialto Company, and to make reports as to the same to the Company. The acts of the defendant in the Department must have been in the way of steps against the United States to prevent the issuance of a "fraud order", if one was contemplated, or to bring about a favorable result in an inquiry which might lead to such an order, if such an inquiry was on foot in the Department.

338 If inquiries as to complaints were merely made, and no attempt made to influence any officer in the discharge of his duty, the defendant committed no violation of the statute, no matter what reports he made to his client, the Rialto Grain and Securities Company.

2. Defendant had the right to engage, for compensation, as counsel in the case of the United States v. Dennis, and to do whatever was necessary and proper to be done in the conduct of the defense, including inquiry and investigation at the Postal Department respecting evidence which might exist there, favorable or adverse to Dennis, and no service rendered by the defendant in connection with the defense of the case against Dennis can be considered in support of the indictment.

3. Any inquiries made, or services rendered, by the defendant in the Postal Department concerning the books of the Brooks Brokerage & Commission Company, and only concerning those books, are not to be considered as supporting any charge of the indictment.

4. Defendant had the right to make inquiries at the Postal Department or of Postal officials as to the existence, or non-existence, of charges against the Rialto Grain and Securities Company, and the making of such inquiries, whether for his own information and guidance, or for the information and guidance of the company, will not support the indictment if there was no effort or purpose thereby to influence the action of any official of the Government.

5. Before the defendant can be held guilty of the charge against him, it must be proven that he did something in connection with the investigation of the Rialto Grain and Securities Company by the Postal Department intended to influence the action of some official of that Department with respect to such investigation, and that defendant was paid, and received compensation, for so doing.

6. As to any claims or demands made by individuals
339 against the Rialto Grain and Securities Company, the defendant had the right to act as counsel for the company, and as such counsel had the right to do whatever was necessary and proper to conserve the legal rights and interests of his client as to such claims or demands, and he had the right in that connection and for that purpose to make inquiry of any Department to ascertain the identity of such persons and whether they held the positions they claimed to hold

8. To sustain the charge against the defendant, it is not sufficient to show that he was employed as counsel by the Rialto Grain and Securities Company, and received compensation as such, and that while employed as General Counsel he rendered services in or about the Postal Department, but it must be further shown that the services rendered by him in and about the Postal Department were so rendered as within the scope and purpose of his employment, and were part of the services which he was to render as General Counsel and for which he was to receive, and did receive compensation.

9. The presumption is that any agreement which parties may make, and which is lawful according to its terms, is lawfully intended, and anyone asserting that such an agreement is merely a cloak or cover for an illegal purpose, must prove the same; and the agreement in this case between the Rialto Grain and Securities Company and the defendant, engaging

him to act as its general Counsel, is to be presumed to have meant what the parties thereto said; unless it is shown that the agreement was a mere cover for an ulterior purpose, and that it was, in fact, intended by the parties that the defendant should render services in and about the Postal Department and was to be compensated therefor.

12. The court charges the jury that a Senator of the United States is privileged from arrest during his attendance upon the Senate during its sessions, that the defendant was
340 so privileged and the Senate of the United States was in session at the time when he was indicted, that the defendant appeared to the indictment without process having been served on him and when he could not have been compelled by law to answer, plead or stand for trial, and that the fact of the waiver of his privilege by the defendant may be considered by the jury upon the question of his guilt or innocence under the indictment.

341 The following Instructions requested by the defendant to be given to the jury, were by the Court refused:

(7) The evidence of what was done by the defendant in the matters of McGowan, Bowman and Shove cannot be considered by you as supporting any charge of the indictment.

(10). If the checks of the Rialto Grain and Securities Company, described in the indictment, were sent to the defendant, and received by him in the city of Washington, D. C., and were by him deposited in the Riggs National Bank in Washington, and the bank gave him credit for the amount of such checks as the same were deposited respectively, and the defendant had the right at once to check against the same and to draw out such money from the bank, and the bank sent the checks to St. Louis and presented them for payment, and they were paid, then the jury are instructed that the checks and the money thereon were received by the defendant in the city of Washington.

(11). The jury are instructed, that after the defendant endorsed the checks in question to the Riggs National Bank of Washington, D. C., and had received credit, in his account with the bank for the amount of such checks, the checks became the property of the bank, and the bank had the right to do with the checks whatsoever it would, and it was under no obligation to account to the defendant for said checks of their proceeds.

The Court: The jury may now retire. The court will not adjourn, but remain in session probably for twenty-four hours, and in the event you agree upon a verdict, I will come here,

and for that purpose can be notified, and will receive the verdict at any time within the next twenty-four hours.

342 The Court at this juncture handed to a member of the jury as they were retiring, a full copy of the charge and the instructions given at the instance of the Defendants Counsel, which were taken into the jury room.

Judge Krum: We except to that part of the charge which states that the law prohibits a Senator of the United States from taking compensation, with reference to an inquiry of the description lodged before the Department. That is not exactly the language of the charge, but I intend to indicate that part of it.

The Court: It is intended to indicate that part of the charge which prohibits the taking of compensation for services rendered, as specified in the indictment?

Judge Krum: No, sir; on the theory that it was compensation taken in a matter in which the United States was interested. I do not remember the exact language of the charge, but that will perhaps sufficiently indicate it.

The Court: That may be considered excepted to. I will allow any exception to the charge which re-states the propositions of law adversely decided on the demurrer.

Judge Krum: Under counts six, seven, eight and nine, the defendant excepts as to that part of the charge which submits the question of fact to the jury in regard to the matter of payment.

The Court: That is clear enough; I can identify all of that.

Mr. Lehmann: We have a difference of opinion about the check matter.

Judge Krum: Under counts one, two and three, and in fact under all of them, we except to that part of the charge which directs the jury, that if they find there was such an in-

343 quiry pending, then the United States was interested, both directly and indirectly.

The Court: That is the same as involved in the demurrer?

Judge Krum: Yes sir.

Mr. Lehmann: As I understand the charge, there is one matter I wish to except to; I think it warrants a finding. Beginning with the first and second payments, to the payment made on March, 26th, that if there were any services rendered theretofore and since the 22nd of November, they could find defendant guilty on that count.

The Court: No, the charge is, that if he received compensation on that day for any services rendered at any time between November 22nd and March 26th.

Mr. Lehmann: That is what I thought. Following that up with the other counts, the sixth, seventh, eighth, and ninth, as to

each one of those, if he received compensation upon the particular day involved in that count, for any services rendered before that time, there can be a conviction upon that.

The Court: Yes.

Mr. Lehmann: My exception to that is, that it authorizes several convictions for one offense—if I make my point clear.

The Court: I understand.

Mr. Lehmann: The conviction would be authorized under that for the same services under each one of the counts, assuming it had been rendered at the earliest part of the period.

The Court: You may fix up that exception. I take it, the receipt of the compensation is the gist of it.

Judge Krum: Your Honor's charge as written goes to
344 the jury, does it not?

The Court: Yes.

Mr. Lehmann: There were declarations of law not given.

The Court: I refused those on the subject of the checks.

Mr. Lehman: To the refusal of those we except, and also to the refusal to give the seventh instruction asked by us.

The Court: All exceptions are allowed in the spirit in which they are asked, and there will be no confusion about that.

The court then took an indefinite recess.

The jury retired in custody of the Marshal and remained in such custody considering of their Verdict, with the indictment, General charge, and instructions in their possession from the time of retiring at 8 o'clock Saturday evening March 26th, until 10 o'clock Monday morning March 28th, 1904. At last named hour they appeared in Court bringing with them the copy of the charge and the instructions and upon request of the Court handed the same to the Court with a request for further advice as stated in the following communication.

March 28th, 1904, 10.00 A. M.

Court reconvened, pursuant to foregoing adjournment, and the following proceedings were had:

The Court: I have received from the foreman of the jury this communication with the request that I make further explanation if deemed proper. The communication is:

"A juror claims that as Senator Burton was employed by the
"Rialto Grain and Securities company as general counsel
345 "such fact did not prohibit him from rendering such
"service before the Post Office Department. The juror's "view, he states, is obtained from page 11, last paragraph, and "page 12, of Judge Adams' instructions in third paragraph. "Said jurors while believing that Senator Burton did at the in-

"stance of the Rialto Grain and Securities Company visit the "Post Office Department at Washington and perform the serv- "ices as shown by the evidence, yet that as the report of the St. "Louis Post Office Inspector showed that there was nothing in "the complaint, the Senator was not guilty of any wrong doing."

I think, gentlemen, that the communication made to the court shows a failure to apprehend the charge of the court and the instructions of the court in respect to the questions which are submitted by this communication. The court in the charge made this statement:

"To permit a senator of the United States, whose influence, "by reason of the high position he holds, is naturally persuasive "and weighty with executive officers, to take compensation from "persons for services rendered such persons before an executive "department, would, it was thought, create a duty in favor of "such persons arising from the implied obligation of fidelity to "the client from whom he should accept a fee, inconsistent with "those relations of ready confidence and entire unreserve which "ought to exist between the lgislative and executive depart- "ments of the government in the promotion of the public weal "and in the enforcement of the laws of the Land."

The Court also said in the charge, paragraph 2, of page 12, as follows:

"Notwithstanding the fact that the accused was a senator "of the United States he had the legal right, so far as this case "is concerned, to practice his profession in any and all of its "phases, and to receive compensation therefor in any
346 "way and manner, and on any terms as to compensation "or otherwise deemed by him best, except that he could "not receive compensation for services rendered before the Post "Office Department, in any maanner pending there in which the "United States was interested as already explained."

In the first paragraph on page 15 the Court said:

"You are the sole judges of the credibility of the witnesses, "who have given evidence in this case, and the weight to be "attached to their testimony, but as to the principles of law "governing the case, it becomes your duty according to the "division of responsibility, which the law has made between "the court and jury, to acknowledge my supremacy, and to "take every expression or conclusion of law, which I have an- "nounced in this charge, as your controlling guide."

In the light of this I will now read the two clauses which the foreman reports that there is a construction put upon [judtifying] the suggestion made in the communication. One is, as said, the last paragraph of page 11 and reads as follows:

"As you have observed during the progress of the trial one "of the sharp issues of fact for you to determine in reaching "a verdict on the several counts is: whether the services ren- "dered by the accused for which he received compensation from "the Rialto Grain and Securities Company, were rendered to "that company, before the Post Office Department, or whether "they were general professional services rendered that Com- "pany, by way of advice, counsel or otherwise, in other matters "not before the Post Office Department."

347 The third paragraph on page 12 to which attention is called reads as follows:

"Notwithstanding the fact that the accused was a senator "of the United States he had the legal right, so far as this case "is concerned, to practice his profession in any and all of its "phases, and to receive compensation therefor in any way and "manner, and on any terms as to compensation or otherwise "deemed by him best, except that he could not receive compen- "sation for services rendered before the Post Office Department "in any matter pending there in which the United States was "interested as already examined"

It would seem that if attention had been carefully given to all phases of the instructions and charge of the court that the questions that are propounded would not have been submitted. As they have been, however, I will explain what in general was meant. Of course it is not meant that if Senator Burton was employed by the Rialto Grain and Securities Company as general counsel that that fact permitted him to render services before the department, for which he was to receive and did receive compensation. The gist of the offense charged in the case is rendering services there for compensation. That is the gist of it, rendering services for compensation. So that in answer to the first suggestion I will say it is undoubtedly an incorrect understanding of the law as well as of the plain meaning of the statements of the charge, to say that merely because the accused was employed as general counsel he had the right to render such services before the Post Office Department. * He had the right to go before the Post Office Department, as I said in substance in the charge several times, in such a way and manner as is consistent with the principles
348 of the law. He could go there and answer questions and make suggestions with regard to any matter that was pending there provided he did it in a free and independent way unaf-ected by the fact of receiving compensation. It would not seem that it is necessary to make further comments with respect to that matter at all. The relations which arise

between a lawyer and client when he is employed and is to receive compensation are such as require the attorney at all times and under all circumstances to be faithful to the client and do not permit him to render services against the client in any way or manner. It is for that reason, as I have stated in the charge that the law prohibits a senator from entering into relations by which he should receive compensation for those services. He should go before the department, if at all, as a representative of the people so that the relation between him and the office should be that of entire unreserve and fairness unaffected by the fact that he is receiving compensation for the services; so that he should be free, so that he should give information to the department, which would subserve the interests of the government and the interests of all concerned, and not be bound by obligations which necessarily inhere from the fact that he is a paid attorney to receive compensation for doing it. In other words, as I said before, the gist of the complaint is rendering services for compensation and therefore the bare fact that he should be employed and had the right to go before the Department to render services does not excuse him provided he receives compensation for those services. I think this will make it clear so far as the first part of the inquiry is concerned, that in order to excuse the Senator from anything he did before the Department in rendering services you must find he did not render those services for compensation, in accordance with the language of the charge, or that he
349 did not receive compensation for those services. If he received compensation for those services he is guilty under the law. It he went there to render services for which he did not receive compensation it was his duty to render those services honestly and to make such answers as the circumstances of the case might require but not under the sanction or under the obligation which a paid attorney is under when he goes there.

Now, the next question which was put was this: that inasmuch as the report of the St. Louis Post Office Inspectors showed there was nothing in the complaint, the Senator was not guilty. Now, when the jury propounded such a question as that to the court, they forgot all that was said during the progress of the trial and repeatedly during the charge. The court remarked that the questions as to whether there was a just complaint or not, a just complaint, pending was entirely immaterial. It is entirely immaterial, whether the complaints that were made before the department, any one or all of them, were found to be untrue. The only question is, was there anything pending before the department, was there an inquiry pending before the department, as to whether there was any

irregularity. The issue is not whether there was an irregularity, but only was there an inquiry pending in reference to an irregularity. That is all there is to that. You can see plainly that the bare fact that service was rendered before the Department in the way charged in the indictment might be the very reason why there would have been in this case the report that there was nothing in the thing which was being investigated. The very thing which is before the jury to be considered, is whether there was anything pending. It is not permitted under the law for a Senator to go before the Department when such an inquiry is made, with a view of affecting the ac-
350 tion of the Department in the slightest way as charged in the indictment. That is the point. I do not think the jury fully read the charge and all the instructions of the court and heeded them when such a question as this is suggested as the basis of difficulty at arriving at a verdict in the case.

Gentlemen, I feel as though it is proper for me to state to you here that there could not be, in my opinion, from my observation of the character and appearance of this jury or from a consideration of the attention which they gave to the trial any better jury found anywhere to pass upon the questions of fact which have arisen in this case. Another trial of this case, which would have to follow in case of failure to agree, would simply require all these proceedings to be had before some other jury, and it is doubtful whether the case can be presented as to all the facts connected with it that would give you more light, or any jury more light, than has already been given by the proceedings in this case. The trial of such a case is attended with great expense and great trouble to many witnesses and to the Department and to the Court, and another trial ought not to be required unless with faithful conscientious consideration of the facts under the law as laid down by the Court you should fail to reach a verdict. It seems to me you ought to go over the matter faithfully considering it, especially in the light of the difficulties which have been suggested here now. I gather from this letter Mr. Foreman, what I may be incorrect about, I would like to ask the foreman of the jury how you are divided. I do not want to know how many stand for conviction or how many for acquittal, but to know the number who stand one way and the number who stand another way. I would like the statement from the foreman.

351 The Foreman: Eleven to one.

The Court: The jury stand eleven to one. I gathered that from the communication. In the light of that fact I feel constrained to make a statement to you and in making it to

use the language of the Supreme Court of the United States as found in United States vs. Allen:

"Although the verdict must be the verdict of each individual "juror, and not a mere acquiescence in the conclusion of his "fellows, yet they should examine the question submitted with "candor and with a proper regard and deference to the opin-"ions of each other; that it was their duty to decide the case "if they could conscientiously do so; that they should listen, "with a disposition to be convinced, to each other's arguments; "that if much the larger number were for conviction, a dissent-"ing juror should consider whether his doubt was a reasona-"ble one which made no impression upon the minds of so many "men equally honest, equally intelligent with himself. If, upon "the other hand, the majority was for acquittal, the minority "ought to ask themselves whether they might not reasonably "doubt the correctness of a judgment which was not concurred "in by the majority."

The communication from the jury rather suggests to my mind not a failure to apprehend the law as it was laid down by the Court, but it seems to be rather a disposition to think that what was laid down by the court is not or ought not to be the law. Now, gentlemen, that kind of thought, if that is the case, cannot be tolerated in a court of justice, made up, as it is, of a court and jury. The court is responsible for the law and the jury's duty is to conform to the principles and
352 the legal propositions laid down by the court and not to question them in the least. This is unquestionably the only way in which proceedings can be conducted wherein judicial judgments are to be arrived at. This is done by the jury recognizing the obligations of the court itself to determine the law and for them to apply that law to the facts of the case.

In order to relieve any member of the jury who might think otherwise, it is entirely proper to say that the law of the case as laid down by the court is subject always to review by an appel-ate court. If this court is wrong in its charge and instructions there is opportunity of reviewing it in an appel-ate tribunal, so that whatever may be your views as to the court not being correct in the announcement of the law, you can always be assured if it is not correct in the matter that counsel for the defense in case of conviction will have full opportunity of submitting the matter to other tribunals to determine what is the true law upon the subject.

I have made these remarks to you knowing and feeling confident that your sole and only purpose is to reach a righteous conclusion in the case. I know you feel and wish to be and are honest men and I make these remarks to you with a view of en-

abling you to retire to the jury room and in the light of the explanation of the two supposed troublesome questions, and in the light of the further comment which the Court has made, to ask you to make a serious attempt to arrive at a verdict in the case.

Mr. Krum: If the Court please, on the part of the defendant, I ask to have your Honor indicate to the jury that the requests to charge asked by the defendant, which were given by the court, constitute as much a part—

353 The Court: If you will wait a moment the jury may retire.

Mr. Krum: I beg your Honor to state to the jury—

The Court: Stop a moment and then I will hear your argument. I will after the jury retire hear counsel if they have anything to say, or any exceptions they may wish to take to the charge. The court here handed the Foreman of the jury the charge and instructions heretofore referred to and directed the jury to retire for further consideration of their verdict.

Mr. Lehman: I do not believe that the requests to charge in the manner made by defendant and were given by the Court to the jury were given as they should have been, the suggestions being made by the court at the time that they were mere abstract statements which had the effect to deprive them of something of their force when they were not intended as mere abstractions and were believed by counsel to have specific reference to the case, and those instructions, as well as others, ought to be called to the attention of the jury. We must except here as earnestly as it is in our power to do against the charge of the court made now.

The Court: If you except, I will allow the exception.

Mr. Krum: What I desire to do in the presence of the jury was to ask your Honor to indicate to the jury, as it was evident the jury did not understand, that it was a fact that the request to charge which were recognized by the court, acquiesced in by the court and given by the court, were just as much a part of your Honor's charge as that which the Court read as emanating from the court itself.

The Court: I did tell the jury so on Saturday.

Mr. Krum: I submit it is apparent that they do not understand that they are just as much to be controlled by that

254 part of the instructions as any other part. That is evident from the inquiry made.

The Court: The Court has endeavored to answer the only request made by the jury, and that is all I think should be done.

Mr. Krum: We except to the last ruling of the court.

Now in order that the foregoing may be made a part of the record of this case, counsel for defendant presents this bill of exceptions and ask- that it may be signed, and made a part thereof, which is accordingly done this 6th day of April, 1904.

ELMER B. ADAMS, *Judge.*

And afterwards and during said May term 1904, of said court, the following further proceedings were had and appear of record in said cause, to-wit:

At recess.

SATURDAY, *July 23d*, 1904.

On this day received the following order from Mr. Justice Brewer which is now entered of record to-wit:

THE UNITED STATES, Plaintiff, *vs.* JOSEPH RALPH BURTON, Defendant. } 4992. Indictment for Violation of Section 1782 of the Revised Statutes of the United States.

Upon the motion of W. H. Rossington, attorney for the defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States, the judgment and sentence heretofore entered herein, and that the amount of bond on said writ of error be and the same is fixed at ten thousand dollars ($10,000.00).

July 9th, 1904.

DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.

Which assignment of errors and petition for writ of error are respectively in the words and figures as follows, to-wit:

Assignment of Errors.

In the United States District Court for the Eastern Division of the Eastern District of Missouri.

THE UNITED STATES *vs.* JOSEPH RALPH BURTON.

Now comes the defendant, Joseph Ralph Burton, and makes his assignment of errors, respectfully showing that the court below erred in each of the following particulars:

I.

The court erred in overruling the demurrer to the indictment and to each count thereof.

II.

The court erred in refusing to allow to the defendant more than three peremptory challenges to the jury, and the number of such challenges as demanded by him.

III.

The court erred in refusing at the close of the case of the United States to instruct the jury to return a verdict of not guilty upon

each count of the indictment; and in refusing to instruct the jury to return a verdict of not guilty upon the whole indictment.

IV.

The court erred in refusing at the close of the whole case to instruct the jury to return a verdict of not guilty for the defendant upon each count of the indictment and upon the whole indictment.

V.

The court erred in the ruling made upon the testimony, as shown by the bill of exceptions, admitting in evidence against the defendant, the letter written by Bella Evans of Albany, New York, to the Post Master General at Washington, D. C., and received there October 28, 1902; and contained on page 7-*a* of the bill of exceptions.

To the offer of this letter the defendant at the time objected as incompetent, and as not showing any matter or thing pending before the Post Office Department; and because the only fact open to consideration, upon the theory of the Government, was the filing of the letter, in the department, and not the contents of the letter.

These objections were overruled by the court and the letter was admitted in evidence.

VI.

The court erred in admitting in evidence against the defendant, the letter of Mrs. K. C. Hout of Albany, New York, addressed to the Postmaster General at Washington, D. C., and received there November 1, 1902. To which letter the defendant objected upon all the grounds stated in his objections to the letter of Mrs. Bella Evans. Which objections were by the court overruled; and the letter was admitted and received in evidence.

VII.

The court erred in admitting in evidence against the defendant, the letter written by Arthur M. Allen of New Brighton, Staten island, New York, to the Postmaster General at Washington, D. C., and received by the Postmaster General on November 29th, 1902. To which letter the defendant objected on all the grounds stated in the objection to the letter by Bella Evans, and upon the further ground that there was no specification in any count of the indictment that any such thing as that constituted a part of the foundation of inquiry set on foot by the Postmaster General and because this letter was not a matter of complaint, but simply a vehicle for transmitting a letter of the Rialto Grain & Securities Company to the Post Office Department. Which objections were by the court overruled and the letter was read in evidence.

VIII.

The court erred in admitting in evidence against the defendant the letter of the Rialto Grain & Securities Company, dated October 22, 1902, addressed to Arthur M. Allen, New Brighton, Staten island, New York, and enclosed by him in his letter to the Postmaster General. The defendant objected to the admission of said letter upon all the grounds stated in the objections to the letter by Arthur M. Allen to the Postmaster General. Which objections were overruled by the court and the letter was read in evidence.

IX.

The Court erred in admitting in evidence against the defendant the booklet of the Rialto Grain & Securities Company, entitled "Golden Gain from Golden Grain", which was enclosed by the said Allen in his letter to the Postmaster General. The admission of this booklet in evidence was objected to upon all the grounds stated in the objections to the letter by the said Allen to the Postmaster General.

X.

The Court erred in admitting in evidence against the defendant, the letter of S. A. Warner of Pittsfield, Massachusetts, addressed to the Postmaster General at Washington, D. C., and received there on January 16, 1903. The defendant objected to the admission of such letter upon all the grounds stated in the objection to the letter of Arthur M. Allen to the Post master General, which objections were by the Court overruled, and the letter was read in evidence.

XI.

The Court erred in admitting in evidence against the defendant the booklet of the Rialto Grain & Securities Company entitled "Giant Oaks from Tiny Acorns Grow"; which booklet was contained in the letter sent by S. A. Warner to the Post-
358 master General. And the defendant objected to the admission of said booklet in evidence upon all the grounds stated in the objection to the letter of said S. A. Warner, Which objections were by the Court overruled and the booklet was received in evidence.

XII.

The Court erred in admitting in evidence the letter of F. R. Fravel, dated November 3, 1902, at Washington, D. C., addressed to the Postmaster General; and the defendant objected to the admission of said letter upon all the grounds stated in the objections made to the admission of the letter of said Allen to the Postmaster General; which objections were by the Court overruled, and the letter was received in evidence.

XIII.

The Court erred in admitting in evidence the letter of the Rialto Grain & Securities Company, dated October 29, 1902, and addressed to F. R. Fravel, at Washington, D. C., and enclosed by said Fravel in his letter to the Postmaster General; and the defendant objected to the admission of said letter upon

all the grounds stated in the objections to the letter of said Fravel to the Postmaster General, which objections were by the Court overruled, and the letter was read in evidence.

XIV.

The Court erred in admitting in evidence against the defendant the "Jacket" or file wrapper from the Post Office Department of the United States, identified by the witness George M. Smith, and being "Miscellaneous Case No. 13,778C", which "jacket" or file wrapper was objected to as not competent and as not showing the pendency of any matter in the department in which the United States was interested, as alleged in the indictment; which objection the Court overruled, and said "jacket" or file wrapper was received in evidence.

359 XV.

The Court erred in admitting in evidence against the defendant the letter of defendant of date November 20, 1902, written from Washington, D. C., to Thomas B. Harlan, at St. Louis, Missouri. The defendant objected to the admission of said letter upon the ground that there was no substantive evidence as to the commission of any offense by the defendant, and in the absence of such evidence, the letter as an admission on his part was not competent—the said letter being as follows:

Washington, D. C. Nov. 20, 1902.

Mr. Thomas B. Harlan,
Rialto Grain & Securities Company,
St. Louis, Mo.

Dear Sir: Your favor of November 18th, received. I called at the department this morning and find that there are two complaints lodged against your company. One by Bella Evans and the other by Mrs. K. C. Hont, both of Albany New York. These complaints were sent out from the main office here for investigation on the 7th of November, and doubtless the inspector there has called your attention to them before now. If he has not, he will do so very soon.

I should like to be advised what there is in these complaints. Without knowing anything about the merits of the same, I would advise that all complaints receive special attention by your company, and if possible satisfy the complainants, especially should this be your motto until after this Brooks matter is entirely out of the way.

I have arranged with the department to be advised in case any complaints are made against your company, and have arranged for a hearing if any hearing should become necessary. I have assured the department that it is the purpose of

360 your company to comply strictly with the law, and that it is your desire to remain at all times in perfect harmony with the department.

No action of any kind will be taken against you without my first being notified, and every opportunity for a full explanation of hearing will be had.

In return, if agreeable, you may make remittance for my first months pay.

Faithfully yours,

J. R. BURTON.

objection was by the Court overruled, and the letter was received in evidence.

XVI.

The Court erred in receiving in evidence the check drawn by H. C. Dennis, as President of the Rialto Grain & Securities Company, dated November 22, 1902, for Five Hundred Dollars, payable to J. R. Burton, together with the endorsements upon the said check; which were all objected to on the ground that they were not competent, for the reason that the issue being whether compensation was received by the defendant for services rendered in the Post Office Department, the receipt of the check in the City of Washington, D. C., established the fact that whatever offense was committed was committed in the District of Columbia, and not in the Eastern Division of the Eastern District of Missouri. But the Court overruled the objection and the check was read in evidence.

The check referred to is No. 624, drawn upon the Commonwealth Trust Company, of St. Louis, by the Rialto Grain & Securities Company, in the sum of Five Hundred Dollars, to the order of J. R. Burton, by him endorsed and also endorsed by the Riggs National Bank of Washington, D. C., and the Commercial National Bank of Chicago.

361 XVII.

The Court erred in permitting to be read in evidence a check of the Rialto Grain & Securities Company, dated Washington, D. C., December 15, 1902, to the order of J. R. Burton, in the sum of Five Hundred Dollars, together with the endorsements on the same of J. R. Burton, the Riggs National Bank of Washington, D. C., the Commercial National bank of Chicago, the Mercantile Trust Company of St. Louis, and the Clearing House stamp of the St. Louis Clearing House; which check was objected to on the ground that it was incompetent, in that if it evidenced the receipt of compensation at all by the defendant,

such compensation was shown by the check to have been received in Washington, D. C. But the objection to the admission of said check was overruled by the Court and the check read in evidence.

XVIII

The Court erred in admitting in evidence the check of the Rialto Grain & Securities Company No. 1698, dated St. Louis, January 22, 1903, drawn on the Commonwealth Trust Company of St. Louis, to the order of J. R. Burton, for the sum of $500, together with the endorsements thereon of J. R. Burton, Riggs National Bank of Washington, D. C., and the clearing house stamp of the St. Louis Clearing House, which check was objected to as incompetent, on the grounds indicated with reference to the previous checks of November 22, 1902, and December 15, 1902.

XIX.

The Court erred in admitting in evidence the check of the Rialto Grain & Securities Company No. 2083, dated St. Louis, February 16, 1903, drawn on the Commonwealth Trust Company of St. Louis, Missouri, to the order of J. R. Burton, in the sum of $500, together with the endorsements; J. R. Burton, Riggs National Bank of Washington, D. C., Commercial National Bank of Chicago, and the Clearing House Stamp of the St. Louis Clearing House; which check was objected to
362 as incompetent on the grounds relating to the previous checks. But the Court overruled the objection and the check was read in evidence.

XX.

The Court erred in admitting in evidence the telegram purporting to have been sent by J. R. Burton, the defendant, to Thomas B. Harlan, dated February 11, 1903, as follows:

> "S. N. McGowan is Indian Agent at the place named, but department had telegram from him yesterday, which indicates that yesterday he was in the territory. The Indian Commissioner will wire to day to see if McGowan is in St. Louis and will make inquiry of him why he is taking such proceedings. Message though signed by him may have been signed by his clerk. Department has great confidence in the real McGowan."

which said telegram was objected to on the ground that it is wholly irrelevant to any inquiry under the indictment, for the reasons that it showed on its face that the only inquiry was with reference to some person supposed to be connected with the Indian Department; but the Court overruled the objection and the telegram was admitted in evidence.

XXI.

The Court erred in admitting telegram from W. D. Mahaney to the defendant, dated February 11, 1903, as follows:

"Discontinue investigation. Matter settled amicably", which was objected to on the ground that it bore no relation to any matter of inquiry under the indictment, but the court overruled the objection and the telegram was read in evidence.

XXII.

The Court erred in admitting in evidence telegram from W. D. Mahaney to the defendant, dated February 25, 1903, as follows:

"Report to me today from apparently reliable source that two special inspectors have been appointed to investigate us and report to Postmaster General. Please verify and advise at once."

363 which telegram was objected to on the ground that it showed on its face that it had no relation to any matter pending in the department and was therefore incompetent. The Court overruled the objection and the telegram was read in evidence.

XXIII.

The Court erred in admitting the telegram from the defendant to W. D. Mahaney, dated Washington, D. C., February 27, 1903, as follows:

"No complaint in the department against you. Will write full particulars by to-night's mail."

which telegram was objected to on the ground that it showed on its face that it bore no relation to any matter pending in the department. But the Court overruled the objection and the telegram was read in evidence.

XXIV.

The Court erred in admitting in evidence the telegram from W. D. Mahaney to the defendant dated St. Louis, February 14, 1903, as follows:

"Thanks for letters. State Investigating Committee here asking for information. Harlan says no occasion for anxiety. All we want is unbiased investigation. Do you think you can do anything to help situation. Check mailed today."

Which telegram was objected to on the ground that the telegram itself showed that it had nothing to do with the case, and was therefore incompetent. But the Court overruled the objection and the telegram was read in evidence.

XXV.

The Court erred in admitting in evidence the letter from Thomas B. Harlan, to the defendant, dated December 2, 1902, beginning with the words:

> "My Dear Sir:—On Saturday night I wired you that indictments had been returned, bonds given etc."

and ending with:

> "Mrs. Harlan and I enjoyed our visit to Washington very much, and shall ever feel kindly for the many courtesies you extended to us",

364 which was objected to by the defendant on the ground that it was not competent, and that it did not relate to any matter pending before the Post Office Department in which the United States was interested; and did not relate to any service rendered by the defendant in such department; and did not relate to any matter or thing covered by the indictment. But the objection was overruled by the Court, and the letter read in evidence.

XXVI.

The Court erred in admitting evidence, against the objection of the defendant, the letter of the defendant to Thomas B. Harlan, dated December 9, 1902, beginning with the words:

> "There is no man by the name of J. H. Bowman who is a Post Office Inspector,"

and ending with the words:

> "These are all important questions that you must carefully consider. I will take care of things at this end of the line. Pleaase keep me constantly advised."

which was objected to on the same grounds as the letter from Harlan to the defendant December 2, 1902. The objection was overruled and the letter was read in evidence, said letter being as follows:

Washington, D. C. Dec. 9, 1902.

Mr. Thomas P. Harlan,
St. Louis, Mo.

My Dear Harlan: There is no man by the name of J. H. Bowman who is a post office inspector. This man Bowman in impersonating a post office inspector violated the statutes, and laid himself liable to punishment. The man operating in Colorado Springs was also a fraud. There has gone from this office no instructions whatever about the Rialto Company, and

365 there is nothing in this office against you at this time. The matter in St. Louis, as you know, is in the hands of Mr. Dice there. I herewith return the letter.

I would suggest that you prepare carefully the case of Dennis for early next month, and I have learned to know that you must

watch carefully that the jury is not set up on you. By the way, can you get a fair trial before Adams? These are all important questions that you must carefully consider.

I will take care of things at this end of the line.

Please keep me constantly advised.

Faithfully yours,

J. R. BURTON.

XXVII.

The Court erred in admitting the letter of Thomas B. Harlan to the defendant dated December 3, 1902, beginning with the words:

> "Monday of this week a man dropped into the office of the Rialto Grain & Securities Company, by the name of J. H. Bowman, of Allentown, Penn."

and ending with the words:

> "P. S. Bowman represented that he was connected with the Philadelphia office".

Which letter was objected to on the ground that it was merely a declaration by the writer to the defendant, and also showed on its face that it had no relation to any matter pending in the department with reference to which the defendant could render any service, but the objection was overruled and the letter was read in evidence.

XXVIII.

The Court erred in admitting a letter of date February 11, 1903, from the defendant to Thomas B. Harlan, beginning with the words:

366 "My Dear Harlan: I have your telegram telling me that things were satisfactory between you and Dice,"

and ending with the words:

> "If agreeable on receipt of this, I wish you would have my month's pay sent in so I can reach it by Monday next."

which letter was objected to on the ground that on its face it showed it did not relate to any matter which was the subject matter of the inquiry before the Court, and was not competent for that reason. But the Court overruled the objection and the letter was read in evidence, said letter being as follows:

Washington, D. C. Feb. 11, 1903.

Mr. Thomas B. Harlan,
St. Louis, Mo.

My Dear Harlan: I have your telegram telling me that things were satisfactory between you and Dice. I hope you are not letting him mislead you in any way.

I will be in St. Louis the fore part of next month, so soon as Congress adjourns, and shall aim to remain several days.

Be sure and keep me advised if there is anything to do at this end of the line before going away. I have tried to keep the department in a good humor with Major Dennis, and think I have succeeded.

If agreeable, on receipt of this, I wish you would have my month's pay [send] in, so I can reach it by Monday next.

Faithfully yours,

J. R. BURTON.

XXIX.

The Court erred at the close of the case of the Government to require it to elect upon which count of the indictment it would further proceed.

367 XXX.

The Court erred in charging the jury as follows:

"Enough has been pointed out by these provision- of the law to clearly show that Congress has made substantial provisions for the enforcement of the Postal Laws of the United States, and has imposed upon the Postmaster General, as the head of the Post Office Department, the authority under certain circumstances, to make an initial inquiry with reference to the fraudulent use of the mails".

"While this duty is being discharged and the initial inquiry is being made by the Post Office Department, with a view of ascertaining and determining what action the Postmaster shall take in a given case, that is: Whether he shall prohibit the use of the mails, and require letters to be stamped "Fraudulent", in the way and manner which I have already explained, the law prohibits any Senator, Representative, Delegate, Head of Department, or other officer or clerk in the employ of the Government, from taking any compensation whatever for services rendered or to be rendered before the department to any person in the matter of such inquiry".

XXXI.

The Court erred in giving to the jury the following as part of its charge:

"With respect to this feature of the indictment, and to the statute relating to the"interest"of the United States,in matters pending before the Post Office Department, the Court declares the law to be: That the United States within the true meaning of section 1782, was interested, both directly and indirectly, in the determination of the question, if such question was pending before the department, whether the Rialto Grain & Securities Company was so violating the law as to require the Postmaster General in the performance of his duty, under the law,

to stop its use of the mails, and to stamp its letters "Fraudulent" in the way and manner already stated and as fully set forth in the indictment.

The United States owed the highest duty to all its citizens to see to it that the law was faithfully enforced, and it was interested in the highest legal sense of the term, within the true meaning of the act of Section 1782, both directly and indirectly, in the question whether the law was so being violated by the Rialto Grain & Securities Company, as to authorize or require its executive officer, the Postmaster General, to exercise the power conferred upon him, and perform the duty imposed upon him by the law."

368 XXXII.

The Court erred in charging the jury, among other things, as follows:

"If you find from the evidence before you that the accused was, on or about the 26th day of March, 1903, a Senator of the United States, duly qualified and acting as such, and at that time, while he was so a senator, there was pending before the Post Office Department of the United States an inquiry as to whether the Rialto Grain & Securities Company was so violating the Postal laws as set forth in these three counts, with a view and to the end of enabling the Postmaster General to determine whether he should instruct the Postmaster at St. Louis to refuse delivery of mail to the Rialto Grain & Securities Company and stamp its mail, "Fraudulent", and return the same, as stated in these counts, and if while such matter was so pending before the department the accused, knowing that such matter was so pending accepted and received at St. Louis, Missouri, within this District, from the Rialto Grain and Securities Company, or any of its officers, acting for and in behalf of said company, the sum of Five Hundred Dollars, for services, of the kind set forth in the counts, as already stated by me, theretofore on any days between November 22, 1902, and March 26, 1903, rendered by him for the company, before the Department in the matter of that inquiry, then it will be your duty to find the defendant guilty as charged in the first and second counts of the indictment, otherwise to find him not guilty on these counts".

XXXIII.

The Court erred in its charge to the jury, in that part of it relating to the sixth count of the indictment, as follows:

"The sixth count of the indictment relates to a transaction different from that involved in the first three counts. This count charges that the accused on or about November 22, 1902, at St. Louis, in this District, accepted and received a certain

check of that date, for the payment of money in the sum of Five Hundred Dollars; that the check was drawn by the Rialto Grain & Securities Company upon the Commonwealth Trust Company, of St. Louis, payable to the order of the accused, and by him endorsed, and afterwards paid to him at St. Louis, Missouri, by the said Commonwealth Trust Company, for services of the kind already called to your attention, theretofore rendered by the accused to the Rialto Grain & Securities Company, in a matter then pending before the Post Office Department, in which the United States was directly interested.

This count then proceeds to set out that the matter so pending before the Post Office Department was whether the Rialto Grain & Securities Company had been violating the laws
369 of the United States as already explained, that is to say; whether it had so devised a scheme to defraud, contemplating the use of the mail service, and actually making use of the mail service in executing this scheme to defraud in violation of the provisions of section 5480, to which I have already referred, so as to require the Postmaster General in the exercise of the power conferred upon him by law, to direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain & Securities Company, any mail, but to return the same with the word "Fraudulent" stamped thereon, upon any and all letters addressed to the Rialto Grain & Securities Company, and sent through the mails to that company at St. Louis, Missouri.

The elements of the offense charged in this [court] are the same as those charged in the first and second counts. If you find from the evidence, by the measure of proof which I shall presently state, that the accused, while a Senator of the United States,[or]or about the 22nd day of November, 1902, knowingly received at St. Louis, Missouri, the proceeds of the check described in this count, from the Commonwealth Trust Company, as compensation for his services theretofore rendered to the Rialto Grain & Securities Company, of the kind and in the way and manner stated in this count, before the Post Office Department in the matter so alleged to have been pending before the department, and known by him to have been so pending when he received the money, then your verdict on this sixth count must be guilty, otherwise not guilty.

The Government claims that the compensation referred to in this count was sent to the accused by the Rialto Grain & Securities Company, in the form of a check, drawn by it on the Commonwealth Trust Company, payable to the order of the accused, by mail; that he received the check representing this compensation at Washington, in the District of Columbia, and then and there endorsed the check, deposited it to his own credit in the Riggs National Bank at Washington; that the

last mentioned bank afterwards forwarded the check by and through its correspondents to St. Louis for payment by the Commonwealth Trust Company, upon which it was drawn, and that the Riggs Bank, and its correspondents in all this matter became and were the agents of the accused for securing this money, and when the money called for by the check was finally paid at St. Louis, Missouri, by the trust company on which it was drawn, it amounted to a payment of that money to the accused at St. Louis, Missouri. This suggests an important feature of the case, for the reason that unless it be true that the accused received the money represented by and paid on this check at St. Louis, Missouri, this court would have no jurisdiction to try the case.

The Constitution of the United States confers upon the accused in every criminal case the right to be tried by an impartial jury of a state and district wherein the crime shall have been committed.

The receipt of the money is the gist of the crime, charged against the accused, and if he did not receive it in this district, in fact in St. Louis where he is charged to have received
370 it, he is not amenable to the law in this district, and cannot be convicted in this court on this sixth count. Accordingly, it becomes your duty to ascertain and find from the evidence, what were the true relations between the accused and the Washington bank, when he deposited the check in question with that bank, and what the understanding between them as to their respective rights in relation to the check and the proceeds thereof. On this question the court charges you as follows:

If it was the intent and understanding of the Washington bank and the accused at the time the latter deposited the check in question with the former, that the bank should forward the same in the usual course by and through its correspondents to St. Louis, for payment, and that in so doing, it, and its correspondents should act only as the agent of the accused for that purpose, then the final payment by the Commonwealth Trust Company, at St. Louis, of the check to the correspondents of the Washington bank, would amount in law to a payment in St. Louis as charged in the sixth count, of the amount of the check to the accused. If on the contrary it was the understanding and intent of the Washington bank and the accused at the time the latter deposited the check in question with the former, that the bank should become the purchaser of the check, and should thereafter be the absolute owner thereof, and not act as just indicated, as the agent of the accused in the collection of the check, then the payment at St. Louis by the Commonwealth Trust Company, would amount in law to a payment to the Washington bank, and not to the accused. In

the latter event no crime would have been committed by the accused in this District, by reason of the check referred to in the sixth count of this indictment.

In order to find the accused guilty on the sixth count, you must find from the evidence, by the same measure of proof as is required in all criminal cases, that the check referred to in the sixth count, was deposited by the accused in the Washington Bank, for collection, and that the bank was to act in collecting the same, as the agent of the accused, and not as the owner of the check in question.

In determining this issue, you are at liberty to and should consider all the evidence adduced; the actual transaction as it occurred at the Riggs' bank, where the money was deposited, the check itself and all its endorsements, the rights and privileges which were immediately accorded the accused upon making the deposit, the actual conduct and purpose of the Riggs' bank, in forwarding the check to St. Louis for payment, the customary conduct and usage of that bank, and all banks in Washington at the time so far as shown by the proof. And if from all these facts and all other facts disclosed by the proof, you find that the check in question was in fact deposited by the accused, with the intent and knowledge on his part, as well as on the part of the bank itself, that it should be forwarded to St. Louis for collection for account of the accused, the bank and its correspondents acting as agents for the accused to make such collection, you should find that when
371 the same was actually paid to the last endorser on the check at St. Louis, by the trust company upon which it was drawn, it was in contemplation [If] law, paid to the accused himself.

If on the contrary you find from the evidence, that the accused and the Riggs' bank at the time of the deposit of the check in question, understood and intended that the bank should become the purchaser of the check and be its absolute owner, then the subsequent forwarding of it to St. Louis for payment was the act of the bank itself, and the final payment of the check by the trust company at St. Louis, was a payment not to the accused, but to the bank, and if such is the fact your verdict on the sixth count must be not guilty".

XXXIV.

The court erred in its charge with respect to the seventh, eighth and ninth counts given, as follows:

"The seventh, eighth and ninth counts of the indictment are similar in all respects to the sixth count, with the exception that in the seventh count the accused is charged with having received a check and the proceeds thereof, dated December 15th, 1902.

And in the eighth count with having received a check and the proceeds thereof, dated January 22, 1903.

And in the ninth count with having received a check and the proceeds thereof, dated February 16, 1903.

The issues with respect to those counts are the same as the issue made by the sixth count with [respecc] to the check therein involved, and the facts to be found by you in determining your verdict on these counts are the same as already stated in discussing the sixth count, except only as to the dates when the compensation is alleged to have been received by the accused, and the principles of law governing your action on these counts as already announced in discussing the sixth count are applicable here, and do not require further statement."

XXXV.

The Court erred in refusing the following instructions asked to be given by the defendant, to-wit:

"(7) The evidence of what was done by the defendant in the matters of McGowan, Bowman and Shove, cannot be considered by you as supporting any charge of the indictment."

XXXVI.

The court erred in refusing the following instructions asked to be given by the defendant, to-wit:

"(10) If the checks of the Rialto Grain and Securities
372 Company, described in the indictment, were sent to the defendant and received by him in the City of Washington, D. C., and were by him deposited in the Riggs National Bank in Washington, and the bank gave him credit for the amounts of such checks as the same were deposited respectively, and the defendant had the right at once to check against the same and to draw out such money from the bank, and the bank sent the checks to St. Louis, and presented them for payment and they were paid, then the jury are instructed that the checks and the money thereon were received by the defendant in the City of Washington.

XXXVII.

The Court erred in refusing the following instructions asked to be given by the defendant, to-wit:

"(11) The jury are instructed that, after the defendant endorsed the checks in question to the Riggs National Bank of Washington, D. C. and had received credit in his account with the bank for the amount of such checks, the checks became the property of the bank and the bank had the right to do with the checks whatsoever it would, and it was under no obligation to account to the defendant for said checks or their proceeds."

XXXIX.

The court erred in directing the jury, on the 28th, of March, 1904, and in charging the jury in the following words:

"Gentlmen, I feel as though it is proper for me to state to you here that there could not be, in my opinion, from my observation of the character and appearance of this jury or from a [consideration] the attention which they gave to the trial, any better jury found anywhere to pass upon the questions of fact which have arisen in this case. Another trial of this case, which would have to follow in case of failure to agree, would simply require all these proceedings to be had before some other jury, and it is doubtful whether the case can be [be] presented as to all the facts connected with it that would give you more light, or any jury more light, than has already been given by the proceedings in this case. The trial of such a case is attended with great expense and great trouble to many witnesses and to the Department and to the court, and another trial ought not to be required unless with faithful, conscientious consideration of the facts under the law as laid down by the court you should fail to reach a verdict. It seems to me you ought to go over the matter faithfully considering it, especially in the light of the difficulties which have been suggested here now. I gather from this letter, Mr. Foreman, what I may be incorrect about; I would like to ask the Foreman of the jury, how you are divided? I do not want to know how many stand for conviction or how many stand for acquittal, but to know the number who
373 stand one way and the number who stand another way. I would like the statement from the foreman.

The Foreman: Eleven to one.

The Court: The jury stand 11 to 1. I gathered that from the communication. In the light of that fact, I feel constrained to make a statement to you, and in making it, to use the language of the Supreme Court, as found in United States vs. Allen:

'Although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case, if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one, which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought

to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.'

The communication from the jury rather suggests to my mind, not a failure to apprehend the law as it was laid down by the Court, but it seems to be rather a disposition to think that what was laid down by the Court is not or ought not to be the law. Now, gentlemen, that kind of thought, if that is the case, cannot be tolerated in a court of justice, made up, as it is, of a court and jury. The Court is responsible for the law, and the jury's duty is to conform to the principles and the legal propositions laid down by the Court and not to question them in the least. That is unquestionably the only way in which proceedings can be conducted wherein judicial judgments are to be arrived at. This is done by the jury recognizing the obligations of the Court itself to determine the law and for them to apply that law to the facts of the case.

In order to relieve any member of the jury who might think otherwise, it is entirely proper to say that the law of the case as laid down by the Court is subject always to review by an appellate court. If this court is wrong in its charge and instructions there is opportunity of reviewing it in an appellate tribunal, so that whatever may be your views as to the court, not being correct in the announcement of the law, you can always be assured if it is not correct in the matter that counsel for the defense in case of conviction will have full opportunity of submitting the matter to other tribunals to determine what is the true law upon the subject.

I have made these remarks to you, knowing and feeling confidant, that your sole and only purpose is to reach a righteous conclusion in the case. I know you feel and wish to be, and are honest men, and I make these remarks to you with a view of enabling you to retire to the jury-room and in the
374 light of the explanation of the two supposed troublesome questions, and in the light of the further comment which the Court has made, to ask you to make a serious attempt to arrive at a verdict in the case."

XI.

The Court erred in directing the jury on the 28th, of March, 1904, and in charging the jury in the following words:

"The Court: I have received from the foreman of the jury this communication with the request that I make further explanation if deemed proper. The communication is:

'A juror claims that as Senator Burton was employed by the Rialto Grain & Securities Company as General Counsel such facts did not prohibit him from rendering such services before the Post Office Department. The juror's view, he states, is

obtained from page 11, last paragraph, and page 12, of Judge Adams' instructions in third paragraph. Said juror while believing that Senator Burton did at the instance of the Rialto Grain & Securities Company visit the Post Office Department at Washington, and perform the services as shown by the evidence, yet that as the report of the St. Louis Post Office Inspector showed that there was nothing in the complaint, the Senator was not guilty of any wrong doing.'

I think, gentlemen, that the communication made to the court shows a failure to apprehend the charge of the court and the instructions of the court in respect to the questions which are submitted by this communication. The Court in the charge made this statement.

'To permit a Senator of the United States, whose influence, by reason of the high position he holds, is naturally persuasive and weighty with executive officers, to take compensation from persons for services rendered such persons before an executive department, would, it was thought, create a duty in favor of such persons arising from the implied obligation of fidelity to the client from whom he should accept a fee, inconsistent with those relations of ready confidence and entire unreserve which ought to exist between the legislative and executive departments of the government in the promotion of the public weal and in the enforcement of the laws of the land."

The Court also said in the charge, paragraph 2, of page 12, as follows:

'Notwithstanding the fact that the accused was a Senator of the United States he had the legal right, so far as this case is concerned, to practice his profession in any and all of its phases, and to receive compensation therefor in any way and manner, and on any terms as to compensation or otherwise deemed by him best, except that he could not receive compensation for services rendered before the Post Office Department, in any matter pending there in which the United States was interested, as already explained.'

In the first paragraph on page 15 the Court said:

'You are the sole judges of the credibility of the witnesses, who have given evidence in this case, and the weight to be attached to their testimony, but as to the principles of law governing the case, it becomes your duty according to the division of responsibility, which the law has made between the Court and the jury, to acknowledge my supremacy, and to take every expression or conclusion of law, which I have announced in this charge, as your controlling guide.'

In the light of this I will now read the two clauses which the foreman reports that there is a construction put upon justifying the suggestion made in the communication. One is, as said, the last paragraph of page 11 and reads as follows:

'As you have observed during the progress of the trial one of the sharp issues of fact for you to determine is reaching a verdict on the several counts is: whether the services rendered by the accused for which he received compensation from the Rialto Grain & Securities Company, were rendered to that Company, before the Post Office Department, or whether they were general professional services rendered that Company, by way of advice, counsel or otherwise, in other matters not before the Post Office Department.'

The third paragraph on page 12 to which attention is called, reads as follows:

'Notwithstanding the fact that the accused was a Senator of the United States he had the legal right, so far as this case is concerned, to practice his profession in any and all of its phases, and to receive compensation therefor in any way and manner and on any terms as to compensation or otherwise deemed by him best, except that he could not receive compensation for services rendered before the Post Office Department in any matter pending therein which the United States was interested as already explained.'

It would seem that if attention had been carefully given to all phases of the instructions and the charge of the Court that the questions that are propounded would not have been submitted. As they have been, however, I will explain what in general was meant. Of course it is not meant that if Senator Burton was employed by the Rialto Grain & Securities Company as general counsel that that fact permitted him to render services before the department, for which he was to receive and did receive compensation. The gist of the offense charged in the case is rendering services there for compensation. That is the gist of it, rendering services for compensation. So that in answer to the first suggestion I will say it is undoubtedly
376 an incorrect understanding of the law as well as of the plain meaning of the statements of the charge, to say that merely because the accused was employed as general counsel he had the right to render such service before the Post Office Department. He had the right to go before the Post Office Department, as I said in substance in the charge several times, in such a way and manner as is consistent with the principles of the law. He could go there and answer questions and make suggestions with regard to any matter that was pending there provided he did it in a free and independent way unaffected by the fact of receiving compensation. It would not seem that it is necessary to make further comments with respect to that matter at all. The relations which arise between a lawyer and client when he is employed and is to receive compensation are such as require the attorney at all times and under all circum-

stances to be faithful to the client, and do not permit him to render services against the client in any way or manner. It is for that reason, as I have stated in the charge, that the law prohibits a Senator from entering into relations by which he should receive compensation for these services. He should go before the department, if at all, as a representative of the people so that the relation between him and the office should be that of entire unreserve and fairness unaffected by the fact that he is receiving compensation for the services; so that he should be free, so that he should give information to the department, which would subserve the interests of the government and the interests of all concerned, and not be bound by obligations which necessarily inhere from the fact that he is a paid attorney to receive compensation for doing it. In other words, as I said before, the gist of the complaint is rendering services for compensation, and therefore the bare fact that he should be employed and had the right to go before the Department to render services does not excuse him provided he receives compensation for those services. I think this will make it clear so far as the first part of the inquiry is concerned, that in order to excuse the Senator from anything he did before the Department in rendering services, you must find he did not render those services for compensation, in accordance with the language of the charge, or that he did not receive compensation for those services. If he received comepnsation for those services he is guilty under the law. If he went there to render services for which he did not receive compensation, it was his duty to render those services honestly and to make such answers as the circumstances of the case might require, but not under the sanction or under the obligation which a paid attorney is under when he goes there.

Now, the next question which was put was this: That inasmuch as the report of the St. Louis Post Office Inspectors showed there was nothing in the complaint, the Senator was not guilty. Now, when the jury propounded such a question as that to the Court, they forgot all that was said during the progress of the trial and repeatedly during the charge. The
377 Court remarked that the questions as to whether there was a just complaint or not, a just complaint, pending, was entirely immaterial. It is entirely immaterial whether the complaints that were made before the department, any one or all of them, were found to be untrue. The only question is, was there anything pending before the department, was there an inquiry pending before the department, as to whether there was any irregularity. The issue is not whether there was an irregularity, but only was there an inquiry pending in reference to an irregularity. That is all there is to that. You can see plainly

that the bare fact that service was rendered before the Department in the way charged in the indictment might be the very reason why there would have been in this case the report that there was nothing in the thing which was being investigated. The very thing which is before the jury to be considered, is whether there was anything pending. It is not permitted under the law for a Senator to go before the department when such an inquiry is made, with a view of affecting the action of the Department in the slightest way as charged in the indictment. That is the point. I do not [thing] the jury fully read the charge and all the instructions of the Court and heeded them when such a question as this is suggested as the basis of a difficulty at arriving at a verdict in the case.

Gentlemen, I feel as though it is proper for me to state to you here that there could not be, in my opinion, from my observation of the character and appearance of this jury or from a consideration of the attention which they gave to the trial, any better jury found anywhere to pass upon the questions of fact which have arisen in this case. Another trial of this case, which would have to follow in case of failure to agree, would simply require all these proceedings to be had before some other jury, and it is doubtful whether the case can be presented as to all the facts connected with it that would give you more light, or any jury more light, than has already been given by the proceedings in this case. The trial of such a case is attended with great expense and great trouble to many witnesses and to the Department and to the Court, and another trial ought not to be required unless with faithful conscientious consideration of the facts under the law as laid down by the Court you should fail to reach a verdict. It seems to me you ought to go over the matter faithfully considering it especially in the light of the difficulties which have been suggested here now. I gather from this letter, Mr. Foreman, what I may be incorrect about; I would like to ask the foreman of the jury how you are divided. I do not want to know how many stand for conviction or how many stand for acquittal, but to know the number who stand one way and the number who stand another way. I would like the statement from the foreman.

The Foreman: Eleven to One.

The Court: The jury stand eleven to one. I gathered that from the communication. In the light of that fact I feel constrained to make a statement to you and in making it to
378 use the language of the Supreme Court of the United States as found in United States vs. Allen:

"Although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his

fellows, yet they should examine the question submitted with candor and with proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.'

The communication from the jury rather suggests to my mind not a failure to apprehend the law as it was laid down by the Court, but it seems to be rather a disposition to think that what was laid down by the Court, is not or ought not to be the law. Now, gentlemen, that kind of thought, if that is the case, cannot be tolerated in a court of justice, made up, as it is, of a court and jury. The Court is responsible for the law, and the jury's duty is to conform to the principles and the legal propositions laid down by the Court and not to question them in the least. That is unquestionably the only way in which proceedings can be conducted wherein judicial judgments are to be arrived at. This is done by the jury recognizing the obligations of the court itself to determine the law and for them to apply that law to the facts of the case.

In order to relieve any member of the jury who might think otherwise, it is entirely proper to say that the law of the case as laid down by the Court is subject always to review by an appellate court. If this court is wrong in its charge and instructions, there is opportunity of reviewing it in an appellate tribunal, so that whatever may be your views as to the Court not being correct in the announcement of the law, you can always be assured if it is not correct in the matter that counsel for the defense in case of conviction will have full opportunity of submitting the matter to other tribunals to determine what is the true law upon the subject.

I have made these remarks to you, knowing and feeling confidant that your sole and only purpose is to reach a righteous conclusion in this case. I know you feel and wish to be and are honest men, and I make these remarks to you with a view of enabling you to retire to the jury room and in the light of the explanation of the two supposed troublesome questions, and in the light of the further comment which the Court has made, to ask you to make a serious attempt to arrive at a verdict in the case."

XLI.

The court erred in refusing to indicate to the jury, upon the request of the defendant, that the instructions given at the instance of the defendant, constituted as much a part of the charge of the court as that portion to which the court referred as its charge.

XLII.

The court erred in overruling the defendant's motion for a new trial.

XLIII.

The court erred in overruling the defendant's motion in arrest of judgment.

XLIV.

The court erred in rendering judgment and sentence herein against the defendant.

And the defendant prays that the said judgment and sentence herein be reversed, set aside and held for naught.

FRED W. LEHMANN,
JNO. F. DILLON,
W. H. ROSSINGTON,
Attorneys for Defendant.

(*Petition for Writ of Error.*)

UNITED STATES OF AMERICA:

STATE OF MISSOURI, } ss:
City of St. Louis, }

United States District Court, Eastern Division of the Eastern District of Missouri.

THE UNITED STATES OF AMERICA } Petition for a Writ of Error
vs. } by the Defendant.
JOSEPH RALPH BURTON. }

Joseph Ralph Burton, defendant in the above entitled cause, feeling himself aggrieved by the verdict of the jury and the judgment entered on the 6th day of April, 1904, comes now by his attorneys and shows to the court that in this cause by the said verdict and judgment and sentence he was convicted of an infamous crime, and also shows that the case involves the construction or application, or both, of the Constitution of the United States, and also shows that the case involves the constitutionality of a law of the United States; and now hereby petitions the said court for an order allowing the defendant to prosecute a writ of error to the honorable the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon such writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of the said writ of error by the Supreme Court of the United States.

Wherefore this defendant prays for the allowance of a writ of error and for an order fixing the amount of said bond and for such further orders and process as may cause the errors complained of to be corrected by the said Supreme Court of the United States, and said verdict, judgment and sentence to be set aside. And your petitioner will ever pray.

JOHN F. DILLON,
W. A. ROSSINGTON,
F. W. LEHMAN,
Attorneys for Defendant.

And on said July 23, 1904, and during said May term, 1904, of said court the following further proceedings were had and appear of record in said cause, to-wit:

THE UNITED STATES, Plaintiff, vs. JOSEPH RALPH BURTON, Defendant.	4992. Indictment for Violation of Section 1782 of the Revised Statutes of the United States.

Now at this day there is filed herein a supersedeas bond dated July 9th, 1904, in the penal sum of ten thousand dollars, ($10,000.00) approved by Mr. Justice Brewer, and a citation citing and admonishing said plaintiff to be and appear before the Supreme Court of the United States thirty days from July 9th, 1904, and signed by Mr. Justice Brewer is also this day filed herein.

Which said bond is in words and figures following, to-wit:

Bond.

Know all men by these presents, that we, Joseph Ralph Burton, as principal, and George W. Davis, Ernest H. Kastor, and Richard C. Kerens, as sureties, are held and firmly bound unto the United States of America in the full and just sum of ten thousand dollars, to be paid to the United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd. day of July, in the year of our Lord, one thousand nine hundred and four.

Whereas, lately, at the November term, A. D., 1903, of the district court of the United States for the eastern division of the eastern district of Missouri, in a suit pending in said court between the United States of America and Joseph Ralph Burton, defendant, a judgment and sentence was rendered against the said Joseph Ralph Burton, and the said Joseph Ralph Burton has obtained a writ of error from the Supreme Court of the United States to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., sixty days from and after the date of said citation, which citation has been duly served.

Now, the condition of the above obligation is such, that if the said Joseph Ralph Burton shall appear, either in person or by attorney, in the Supreme Court of the United States, on such day or days as may be appointed for the hearing of said cause in said court, and prosecute his said writ of error, and shall abide by and obey all orders made by the United States Supreme Court, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the district court of the United States for the eastern division of the eastern district of Missouri on such day or days as may be appointed for a retrial by said district court, and abide by and obey all orders made by said court provided the judgment and sentence against him shall be reversed by the Supreme Court of the United States, then the above obligation to be void, otherwise to remain in full force, virtue and effect.

JOSEPH RALPH BURTON. [SEAL.]
GEORGE W. DAVIS. [SEAL.]
ERNEST H. KASTOR. [SEAL.]
RICHARD C. KERENS. [SEAL.]

Witness as to all names:
W. H. ROSSINGTON.

Approved:
DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.

July 9th, 1904.

On June 2nd, 1904, a stipulation was filed in said cause, which is in words and figures as follows, to-wit:

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

United States
v.
Joseph R. Burton.

It is agreed, that on March 28, 1904, defendant filed the following motion for a new trial, to-wit:

"In the District Court of the United States, East Dist. Mo.

The United States
v.
Joseph R. Burton.

The defendant moves the Court to grant him a new trial, for the following reasons:

The Court admitted incompetent evidence offered by the United States, in letters from the defendant to Harlan and in letter from Harlan to the defendant; in letters and telegrams to and from the defendant and others; in testimony covering checks received by the defendant in Washington, D. C.; in testimony as to visits by the defendant to offices in the Post Office Building in Washington and conversations thereupon in testimony as to conferences between defendant and others outside of the offices of the Post Office Department; in testimony touching the custom of banks in regard to checks; in testimony covering complaints lodged with the Post Office Department in regard to the Rialto Grain and Securities Company; in testimony as to inquiries made by the Defendant about books of the Brooks Brokerage Company and correspondence relating thereto.

The Court gave improper and erroneous directions to the jury upon questions of law in the case.

The Court refused the demurrers to the evidence offered by the defendant.

The Court refused to give proper instructions asked by the defendant.

The Court erred in commenting upon the reported fact that the jury were divided, in asking how they stood, and then specially directing them in that regard

The Court erred in its charge to the Jury based upon an inquiry addressed to the Court by the foreman of the jury.

The Court erred in refusing to indicate to the jury, that the instructions given at the instance of the defendant were to be considered as well as the general charge.

The verdict is against the evidence and the weight of the evidence.

The verdict is the result of mere passion and prejudice against the defendant on the part of the jury.

FRED W. LEHMAN,
CHESTER H. KRUM,
For Defendant.

382b That on March 29, 1904, defendant filed the following motion in arrest, to-wit:

In the District Court of the United States, Eastern Division
Eastern District of Missouri.

The United States of America
vs.
Joseph Ralph Burton.

The defendant moves the Court to arrest the judgment in the above entitled case, for the following reasons:

First: Neither of the counts of the indictment states facts sufficient to constitute an offense against the laws of the United States.

Secondly: Neither of the counts states facts sufficient to show either the pendency in the Post Office Department of the United States of a matter or thing, or any interest directly or indirectly in such matter or thing on the part of the United States.

Thirdly: The Court was without jurisdiction to try and determine the said case at the time when it was tried and determined, and all proceedings had therein are void and should be for naught held.

Fourthly: The privilege of freedom from arrest granted to the defendant during the session of the Senate of the United States is not merely a personal privilege, but is a prohibition against arrest or judicial proceedings against a member of the Senate of the United States during a session of the Senate, which cannot be waived by such member.

FRED W. LEHMAN,
CHESTER H. KRUM,
Attorneys for Defendant.

That the Court overruled the foregoing motions April 6, 1904, and defendant excepted.

DAVID P. DYER,
For United States.

CHESTER H. KRUM,
For Defendant.

383 Opinion on Demurrer to Indictment.

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

The United States
vs.
Joseph Ralph Burton.

On Demurrer to Indictment.

Adams, Judge:

The offense charged in the indictment is denounced by Section 1782 of the Revised Statutes of the United States, and stripped of verbiage is: that the accused, a senator of the United States, received a pecuniary compensation from the Rialto Grain and Securities Company for services rendered by him to that company in a matter pending before the Post-Office Department. The matter alleged to have been so pending is: whether the Securities Company had so violated Section 5480 R. S., by divising a scheme to defraud, contemplating the use of the United States Mails, as to require the Postmaster General to forbid the use of the mails to the Securities Company, and to direct the Postmaster at St. Louis to return all letters coming to that post-office, addressed to the Securities Company, to the writers thereof with the word "fraudulent" stamped thereon, and to make an order to that effect.

A demurrer has been interposed to the indictment on the grounds:

First: That the Postmaster General had no authority on the facts stated in the indictment to make the order forbidding the use of the mails to the Securities Company.

Second: That no matter or thing was pending before the Post-Office Department in which the United States was interested within the purview of Section 1782. These will be considered in their order.

384 Section 3929 of the Revised Statutes provides in effect: that the Postmaster General, may upon evidence satisfactory to him, that any person is engaged in conducting any scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, instruct postmasters at any post-office at which letters may arrive directed to any such person, to return all such letters to the postmasters at the offices at which they were originally mailed with the word "Fraudulent" plainly written or stamped upon the outside of such letters.

The indictment alleges that the matter pending before the Post-Office Department was: whether the Securities Company had violated the provisions of Section 5480 R. S., which denounces the use of the mails for executing schemes to defraud as a crime, when according to the contention of counsel for the accused it should have alleged that it was then so violating those provisions.

The argument is: that the Postmaster General had no jurisdiction to issue the so-called fraud order, or stop the mail of the Securities Company, except on evidence satisfactory to him that the company was then conducting a fraudulent scheme, and that the averment that the company had so conducted such a scheme is not enough. I am not impressed with the importance of this criticism.

Section 5480 R. S., to which section 3929 R. S. manifestly refers, so far as the fraudulent scheme for obtaining money through the mails there referred to is concerned, contemplates an executed transaction.

No indictment would lie unless the offense had been completed by the actual deposit of some letter in furtherance of the fraudulent scheme in the post-office. Such offense actually committed once and, a fortiori, many times, would be strong evidence that the offender was actually engaged in conducting business fraudulently within the meaning of Section 3929.

385 But waiving this view, it must be observed that the gist of the offense charged against the accused is: that he unlawfully received compensation for services rendered by him before the post-office department in relation to a matter in which the United States was interested.

The indictment accurately charges all the statutory elements of the offense, namely; that the accused rendered services before the department; received compensation therefor, (naming the party to whom the services were rendered, and from whom the compensation was received) the amount which he received; the time when he received it, and that the United States was interested in the matter in relation to which he rendered the services.

For the purpose of informing the accused as to the nature and character of the matter in question, the pleader undertook to state what was pending before the post-office department in relation to which the accused rendered the services. The sole purpose of this statement was to fairly and reasonably inform the accused of the general nature of the matter; and for this purpose, as was conceded in argument, no such

particularity of averment is required, as would have been necessary if a criminal charge was being laid against the Securities Company. It is entirely sufficient if the averments fairly serve the purpose of informing the accused of the general nature of the matter which was pending before the department, and in regard to which he is charged with having rendered service.

But a conclusive answer to this first criticism is: that the indictment after alleging that the inquiry before the department was: whether the Securities Company had violated Section 5480 R. S., charges that the matter so pending before the department was "to the end and for the purpose of enabling the Postmaster General of the United States, in pursuance
386 of the authority vested in him by law to ascertain, find and determine from evidence satisfactory to him, whether he should order and direct the postmaster at St. Louis not to deliver to the said Rialto Grain & Securities Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside, any and all letters addressed to said Rialto Grain & Securities Company, and sent to or through the post-office at St. Louis, Missouri, by means of the post-office establishment of the United States".

All other averments in my opinion might be treated as surplusage. Those just quoted would in and of themselves sufficiently apprise the accused of the matter pending before the department. It cannot be successfully claimed, I think, that the Postmaster General did not have jurisdiction and ample authority under Section 3929, R. S. as amended, to forbid the use of the mails by the Securities Company, and to issue the so-called "fraud order", under some circumstances. If he had such jurisdiction in the abstract, that is: if he could have exercised the jurisdiction of forbidding the use of the mails to the Securities Company under any circumstances, such was jurisdiction enough for the purposes of this case.

I know of no reasons why in this incidental feature of the indictment, the pleader should be called upon to state accurately all the facts necessary to give jurisdiction to the Postmaster General. The law (Section 3929) conferred the jurisdiction just referred to upon the Postmaster General, and of this law, the courts take full cognizance. I think the pleader might properly enough have omitted all else in the indictment on the subject now discussed, except that portion above quoted, and the necessary jurisdiction in the Postmaster General would have sufficiently appeared. Certainly no injury can befall the accused by reason of the detail statement of evidential facts. This tends to apprise him more fully than the law requires, of the nature of the matter pending before the department.

387 The next question is whether the United States was interested in the matter so pending before the post-office department within the meaning of Section 1782, supra.

A question preliminary to this is: what kind of a "matter" or "thing" is within the comprehension of the section. The prohibition of the statute is against rendering any service to any person "in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military or naval commissioner whatever".

It is first contended by counsel for the accused that the words "other matter [of] thing" found in the enumeration, cannot enlarge the particular specification which precedes it. The rule "ejusdem generis" is invoked, to the effect: that when such general words follow particularly specified subjects in a statute, the general words must be construed as not enlarging the particulars enumerated, and as not creating any new subject differing from those specified. This generally speaking, is a well recognized rule of construction, but clearly does not go to the extent of altogether nullifying the general words. Its true meaning is that the general words must be construed as comprehending and embracing other subjects like those specified, that is: of the same general character, or so related to them as to be within the legislative intention.

Effect must be given to all words of a statute if possible Congress therefore must be held to have intended something by the use of these general words. Now what is it?

Congress industriously specified the several subjects just mentioned, obviously intending to cover any and all matters or things that might be the subject of inquiry before a department in which the United States should be interested.

388 The statute in the language employed, embraces the actual "proceeding", "controversy", "charge", "accusation" or "arrest" in which the United States might in any legal technical sense be a party. It then adds the words "contract", and "claim", manifestly embracing the matters in which the United States might be interested pecuniarily. Congress then doubtless realizing that in the several executive departments and bureaus of the government, divers other matters might properly and necessarily be the subject of consideration and investigation, made use of the other general words, "or other matter or thing". I think these words within the true meaning of the rule of construction known as "ejusdem generis" were intended to cover kindred subjects, like preliminary ex-

aminations and inquiries necessary to enable the Government acting through one of its departments, bureaus, officers etc., to determine whether a proceeding should be instituted, a charge or accusation made, or an arrest ordered, or whether a contract or claim should be made.

All of these things are obviously important in the conduct of the great executive departments and bureaus of the government, and it is with reference to these executive departments and bureaus that the provisions in question appear. The chief functions of these departments and bureaus are to investigate, determine and act, and not to sit as courts in the matter of actual arrests, accusations, or controversies in the legal sense.

I think in the light of the foregoing considerations that the general words "or other matter or thing" fairly embrace the inquiry or investigation alleged in the indictment to have been pending in the Post-Office Department. This conclusion it seems to me is eminently correct, so far as the particular charge laid in the present indictment goes.

The Postmaster General is alleged to have been en-
389 gaged in making an inquiry as to whether the Securities Company should be deprived of the use of the mails. This inquiry was quasi judicial in its character. It could be followed by an order depriving the Securities Company of exercising the valuable privilege of using the mails. Such an inquiry involved many of the essential characteristics of a "proceeding" or "accusation", at least, in my opinion, enough to make it so akin to, or so like the "proceeding", or accusation" of the statute as to be fairly comprehended by the general words under consideration.

It is next argued that even if the inquiry before the Postmaster General in question was within the contemplation of the statute, the United States is not directly or indirectly interested in it, and therefore that the accused is guilty of no offense within the meaning of section 1782 R. S., even if he did receive compensation for services rendered to the Securities Company before the department in the matter under investigation.

It is true as argued by counsel that the statute in question carries a limitation. The matter or thing involved must be one "in which the United States is a party, or directly or indirectly interested." It is not averred in the indictment that the United States was a party to the proceeding in question, but that it was directly, and in the second count, indirectly, interested. Counsel have called attention to several cases in the United States Supreme Court, and in State Courts of last

resort in which the words "interest" and "interested" are found in statutes relating to disqualification of parties, witnesses and judges in legal proceedings, that is: suits pending in the courts, and to cases of quo warranto involving the right of appeal in cases in which the state is interested as a party or otherwise. In these cases it has been held generally that the "interest" referred to must be a pecuniary or property interest, and counsel for the accused contend that the interest of the United States contemplated by Section 1782 is
390 only that kind of an interest, namely; a pecuniary or property interest, and that the matter or thing pending before the department within the purview of that section, must be one in the determination of which the United States may gain or lose something of value.

These cases involve statutes relating generally to suits or actions at law wherein property, or property rights are involved. The witnesses and judges whose "interest" in the matter was made a disqualification, were such as had no other duty to discharge in those cases, except so far as the witnesses were concerned, to testify, and so far as the judges were concerned to render judgments and pass upon rights of property, or other valuable rights, which afforded the subject of the particular litigation in hand. The legislators which enacted the statutes construed in those cases, obviously had primarily in view the narrow sphere of the subject of litigation, which of course was property,—the vindication of individual right, or the redress of individual wrong. The legislative vision need not and did not extend beyond the effect of the pecuniary interest of the witnesses or judges in the individual cases. Is this the measure of duty or obligation of the United States in the matter of inquiries or investigations pending before its executive departments or bureaus? I think not.

The United States in effect agreed with the states, and with the people of the states by the adoption of the Constitution and the acceptance of the powers delegated to it by the states, that it would among many other grave responsibilities represented by delegated powers establish post-offices and post roads, and it agreed that it would pass any and all laws requisite and necessary to make that grant of power effectual. Pursuant thereto it, by its congress, has passed many laws regulating the mail service; prohibiting its use for fraudulent purposes and punishing offenders.

391 The Constitution and the laws of the United States made pursuant thereto, is the supreme law of the land. The President is the chief executive officer, and the Constitution declares in terms: that he "shall take care that the laws

be faithfully executed", and requires that he shall take a solemn oath to faithfully discharge this obligation. Numerous executive departments, which are but an arm of the President for the performance of his executive duty, have been organized to aid him in the discharge of the same.

It follows from these considerations that in the performance of this duty the executive department is but fulfilling the high obligation imposed upon it by law. This is a duty which the government owes, not as a moral obligation resting alike upon all the citizens of the Republic, but is a duty imposed upon its executive officers and departments by law, and one which under the highest and most solemn obligations they must perform.

Madison in one of his famous papers on the Constitution, says: "The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers and designed for different purposes."

In my opinion the government of the United States is interested in the matters of inquiry and investigation pending before its executive departments, looking towards the enforcement of its laws in a higher measure of legal obligation, than an ordinary agent is bound by the contract between him and his principal, to perform his duties.

No one would question for a moment that such an agent would be interested, even in a pecuniary sense in the performance of his duty. For failure to do it, legal liability might accrue against him.

I regret that industrious counsel have not been able to call my attention to any adjudication of any court on the
392 direct question now under consideration. So far as I know the particular feature of Section 1782, now under consideration, has never been adjudicated by any court of the United States. In the absence of the aid of any prior adjudication I have now given the statute in question such interpretation as its language, taken in connection with the obligations imposed by the Constitution and laws upon the executive department of the United States, seem to me to require.

It follows that in my opinion the United States can be and is interested as charged in the indictment in the matter alleged to have been pending before the post-office department. I think the same conclusion would follow if heed should be given to the ordinary and natural meaning of the word "interested". Its primary meaning is: "to be concerned in a cause or its consequences", and this meaning is the one which ordinarily should be given to legislative enactments.

The demurrer to the indictment must be overruled.

393 Opinion on Motion for New Trial.

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

United States
vs.
Joseph Ralph Burton.

Memorandum on Motion for a New Trial.

Adams, Judge.

In reviewing the proceedings taken at the trial of this action, I conclude as follows:

First: There was no error in refusing to permit the defendant ten challenges. Section 1782 under which the indictment was found, denominates the offense as a misdemeanor. Therefore Section 819 of the Revised Statutes, as interpreted by Bannon and Mulky vs. United States, 156 U. S., 464; Regan vs. United States, 157 U. S., 303; Harrison vs. United States, 163 U. S., 140, confers the right to three challenges only.

Second: The letters and enclosures sent by different persons to the Postmaster General concerning the business and conduct of the Rialto Grain & Securities Company, were admissible on two grounds:

First: As evidence showing that a matter was pending before the Department, as charged in the indictment, and

Second: As showing the nature of the matter so pending, to be as charged in the indictment, especially that the matter was of such a character as might under the provisions of Section 3929 R. S., as amended, lead the Postmaster General to forbid the use of the mails to the Rialto Grain & Securities Company.

Third: No error was committed in admitting letters written by the defendant to the attorney of the Rialto Company, or letters from the attorney to the defendant, or telegrams passing between the two last mentioned. This evidence tended to show the nature of the original employment of the defendant by the Rialto Company, and also tended to
394 show what the actual services were, and also tended to show (which is more important) the actual services which were rendered by the defendant to the company, and particularly tended to show that they were services rendered before the Department in the matter of the inquiry then pending before the Department.

There was testimony given by the witnesses as to the defendant's visits to the Department, and services rendered by him there; but such was not all the services the letters and tele-

grams passing between the defendant and the Rialto Company tended to show. They contained admissions made by the defendant with respect to what he had done in the Department, and with respect to what he had accomplished by his actions in the Department. These admissions were of course competent evidence against him, and tended to elucidate the purpose of the defendant in visiting the Department.

Moreover it cannot be said that the defendant never was in the Department, or before any of the officers of the Department, at any other times, or under any other circumstances than those disclosed by the testimony of witnesses which were produced. It may be true, and in the light of the correspondence it seems as if it were true, that the defendant accomplished much more in the Department, either directly or indirectly, by ways and means which were not brought out in detail, than what was disclosed by the oral testimony of witnesses. His own admissions contained in his letters, strongly indicate that he employed some other means for obtaining his information and accomplishing his purposes, than those disclosed by the witnesses actually produced.

The letters, telegrams, interviews and circumstances all should have been, and doubtless were taken into consideration by the jury in determining the issues submitted.

Fourth: The evidence concerning the actual transaction between Burton and the Rigg's bank, and of the general course of business, both of that bank, and other banks in Washington, was admissible in determining the intent and purpose and understanding of the defendant and the bank's officers, at the time he deposited his checks. A general custom is not only evi-
dence of the fact of such custom, but it is also evidence
395 from which the jury may infer knowledge on the part of
any person dealing in matters relating to the custom.

Fifth: The contention that there was no evidence that defendant's services rendered before the Department had any tendency to induce, or did induce the Postmaster General to act favorably to the Rialto Company in a matter pending before the Department, as to whether a fraud order should be issued, is in my opinion, not warranted by the proof.

Section 3929 of the Revised Statutes, as amended, together with the Rules and Regulations of the Post-Office Department in evidence, clearly show that the purpose of the inquiry pending before the Department, could be nothing else than to determine whether the Postmaster General should forbid the use of the mails to the Rialto Company. The law authorized him to take no other action in the event he found that the Rialto Company was engaged in a fraudulent business, except to issue the so-called fraud order. The defendant knew the law, and it is

certainly a fair and reasonable inference from the facts disclosed by the proof, in relation to defendant's services and conduct before the Department, that he intended them to have the effect of inducing the Postmaster General, not to do the thing which alone he might do as the result of the investigation. The Postmaster General and his subsidiary officers should be presumed to conduct their inquiries and investigations for some purpose, and the defendant can fairly be presumed to have intended that the officers of the Department were conducting the inquiry or investigation for some purpose, and that the purpose, as already indicated, under the law, could be nothing else than to determine whether a fraud order should be issued. All persons are presumed to intend the natural consequences of their conduct.

The bare fact, if it be a fact, that the defendant did not in terms ask any of the officers of the Post-Office Department to refrain from issuing a fraud order, or that he did not in fact express any wish to that effect, cannot conclude the inquiry on the important issue now under consideration. It is obvious
that the most diplomatic way of accomplishing that re-
396 sult would be to adopt a much less pronounced and emphatic course. The statement that the officers of the Rialto Company were honorable men, and desired to do nothing wrong, would seem to be a much more persuasive argument in favor of not issuing a fraud order, than a direct appeal to that effect.

Sixth: The jury had a right, not only to hear and take the oral testimony into consideration, but to draw any and all fair and reasonable inferences from established facts. I think nothing went to the jury that did not in some way bear upon, either the relation of the defendant to the Rialto Company, or to the services which he was actually rendering that company.

Seventh: The defendant cannot, in my opinion justly complain, at the refusal to give any of the requests which were in fact refused: The charge itself, and the requests given, present the issues of facts submitted to the jury in a light fully as favorable to the defendant as the case warranted.

Eighth: The exceptions to the main charge, in so far as it related to questions which were disposed of by the demurrer, involve the true construction of Section 1782 R. S., and need no further consideration here than a reference to the opinion of the court on the demurrer. I now see no reason for changing that opinion.

Ninth: The contention that the court erred in its supplemental charge to the jury, based upon the inquiries addressed

to the court by the Foreman of the Jury, is in my opinion, without merit.

The jury retired on Saturday evening, the 26th of March, and on retiring received from the court a clear copy of the original charge, and of all the instuctions given at the instance of the defendant. These remained in the possession of the jury, which was kept together in the custody of the Marshal, until Monday morning at ten o'clock. Upon giving the instructions so called after the charge, the court told the jury that it gave them in connection with the charge, as amplifying the same. No objections were made by counsel at the time of the giving of the instructions to anything that was said by the court in re-
397 lation thereto, and no request was made by counsel for any additional directions to the jury, concerning these instructions. They were given to the jury as part of the charge, without objection and without criticism by counsel, as to the manner of giving them and were in the possession of the jury, and undoubtedly subject to their careful consideration for thirty-six hours.

After this lengthy consideration of the case, a communication was sent to the court by the Foreman of the Jury, indicating two particulars in respect of which a juror desired further instructions. The jury was brought into court; the communication read; and further instructions as to those two points, were given by the court in such way and manner, that no objection or exception was made thereto.

After giving the instructions on the two propositions submitted, the court took occasion to say to the jury as follows:

"I feel as though it is proper for me to state to you here that there could not be, in my opinion, from my observation of the character and appearance of this jury, or from a consideration of the attention which they gave to the trial, any better jury found anywhere to pass upon the questions of fact which have arisen in this case. Another trial of this case which would have to follow in case of failure to agree, would simply require all these proceedings to be had before some other jury, and it is doubtful whether the case can be presented as to all the facts connected with it, so as to give you more light, or any jury more light than has already been given by the proceedings in this case. The trial of such a case is attended with great expense and great trouble to many witnesses and to the Department and to the court, and another trial ought not to be required unless with faithful con-

scientious consideration of the facts under the law as laid down by the court you should fail to reach a verdict. It seems to me you ought to go over the matter faithfully considering it, especially in the light of the difficulties which have been suggested here now."

Thereafter the court asked the Foreman how the jury stood
numerically, and was informed that it stood eleven to
398 one. After being so informed the court said as follows
to the jury:

"*That although the* verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen with a disposition to be convinced, by each other's arguments; that if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority."

The court further in conclusion said to the jury:

"I have made these remarks to you knowing and feeling confident that your sole and only purpose is to reach a righteous conclusion in the case. I know you feel and wish to be and are honest men, and I make these remarks to you with a view of enabling you to retire to the jury room and in the light of the explanation of the two supposed troublesome questions, and in the light of the further comment which the court has made, to ask you to make a serious attempt to arrive at a verdict in the case."

The jury were then told to retire, and the court delivered to the Foreman the copy of the main charge, together with the instructions which had been given at the instance of the defendant at the close of the case. After the jury retired, the defendant's counsel noted an exception to the charge of the court as just then made.

In the fore-part of this supplemental charge, the court did nothing but reiterate and explain the propositions, which it fully announced in the original charge and instructions, in relation to the two troublesome questions submitted, namely; whether the defendant's employment as general counsel

399 prohibited him from rendering services before the Post-Office Department, and also whether the bare fact that the Post-Office Inspector at St. Louis reported favorably, to the Rialto Company upon the first two complaints made against the company, would require a verdict of not guilty at the hands of the jury.

There was nothing said to the jury by way of explaining the principles of law governing the two questions submitted, that had not already been said in the main charge, and no different principle of law was announced, and in the subsequent phase of the supplemental charge calling the attention of the jury to the great expense and trouble attending a trial of such a case, and to the consideration to which the jury had obviously given to all the evidence as it had been produced, and to the advisability of not requiring another trial "unless with a faithful conscientious consideration of the facts, under the law, as laid down by the court, the jury should fail to reach a verdict," which was not in full accord with the usual practice of this and all other federal courts, and which had not received the full sanction of courts of controlling authority. The court in that connection told the jury that they ought to go over the matter again, faithfully considering it in the light of the difficulties which had been explained. Certainly counsel familiar with the practice of the courts, as defendant's counsel have long been, could have no just criticism to make concerning such suggestion.

The next phase of the supplemental charge in which the jury was told that a "dissenting juror should consider whether his doubt was a reasonable one, which made no impression upon the minds of so many men, equally honest, and equally intelligent with himself," announced no new proposition, either of law or practice.

The phases of the supplemental charge just alluded to, have the full sanction and approval of the Supreme Court of the United States, in the cases of Allen vs. United States, 164 U. S., 492, 501, and cases therein cited; Allis vs. United States, 73 Fed., 165, 182, and in Allis vs. United States, 155 U. S., 117.

400 At the conclusion of the supplemental charge to the jury, the court, deeming it unseemly to permit any discussion by counsel in the presence of the jury, declined to hear counsel until the jury retired from the room. Afterwards upon the invitation to counsel to state any exceptions they might have to the supplemental charge, the exception already referred to, "namely; to the charge of the court made now" was duly made and allowed. Afterwards the court was

requested to indicate to the jury that the requests to charge, which were recognized and given by the court were as much a part of the court's charge, as that which was involved in the main charge itself, with the statement by counsel that the instructions ought to be called to the attention of the jury. The court declined to call the jury back, either to indicate what was suggested, or to call the jurys' attention to the instructions, which were given at the instance of the defendant,—for these reasons:

First: Because the court had on the previous Saturday, said to the jury, that those instructions were given in connection with the charge, as perhaps more fully amplifying it.

Next, Because those specific instructions had been in the hands of the jury at all times during their retirement, and were again given by the court to the Foreman of the Jury, upon their retirement at the conclusion of the supplemental charge.

From these facts the court believed that the jury necessarily understood that the specific instructions were to be taken by them in connection with the charge, and to be considered by them as part of the court's instruction.

Next, The court believed that by making special reference to those specific instructions, the jury's attention would have been improperly directed to certain phases of the total instructions, to the exclusion of the main and exhaustive instructions found in the charge itself.

Next, After the jury had been in retirement for thirty-six hours or more, and had requested instructions only on two well marked and defined phases of the case, the court had reason to believe, and did believe that those phases of the case were the only ones about which the jury desired further instructions.

401 Next, The important features of the requests were fuly covered by the main charge.

All considered, the court was then of the opinion that any further comments besides those made to the jury in answer to their specific requests, and those suggestions already referred to, would necesarily work confusion and disadvantages to the jury "in the effort in making a serious attempt to arrive at a verdict in the case," which the court admonished the jury to make.

After making a careful and conscientious review of all the proceedings at the trial, I am satisfied that the defendant has had a fair and impartial consideration of the charges made

against him in the indictment, and that the law from the beginning to the end of the trial, was declared as favorably to him, as the case warranted.

The motion for a new trial will be overruled.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } ss:

I, James R. Gray, clerk of the district court of the United States, in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings with all things concerning the same in case No. 4992 of The United States, plaintiff, against Joseph Ralph Burton, defendant, as fully as the same remain on file and of record in said case in my office, and that the original writ of error and citation are hereto attached and herewith returned.

In witness whereof, I hereunto subscribe my name, and affix the seal of said court, at office in the city of St. Louis, in said district, this 3rd day of August, in the year of our Lord nineteen hundred and four.

{ Seal of the United States District Court, Eastern Division of the Eastern Judicial District of Missouri. }

____ ____,
Clerk of said Court

Endorsed on cover: File No. 19,443. E. Missouri D. C. U. S. Term No. 343. Joseph Ralph Burton, plaintiff in error, *vs.* The United States. Filed August 16", 1904. File No. 19,443.

OCT 5 1904

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 343.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

MOTION TO ADVANCE.

JOHN F. DILLON,
FREDERICK W. LEHMANN,
W. H. ROBBINGTON,
Attorneys for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 18170

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 343.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

Petition of Joseph Ralph Burton, Plaintiff in Error in the Above-entitled Cause, for the Advancement of said Cause to an Early Hearing and Determination.

To the Honorable Supreme Court of the United States:

Your petitioner, Joseph Ralph Burton, respectfully shows unto this honorable court that there is now pending in this court a writ of error to the United States district court for the eastern division of the eastern district of Missouri, and that in obedience to said writ of error there has been lodged in this court the record of the trial of said cause, including a bill of exceptions, and the same is awaiting a hearing herein upon numerous exceptions therein contained; that said proceeding was instituted against your petitioner, who is a duly elected, qualified, and acting United States Senator from the State of Kansas, under an indictment charging

him with violating section 1782 of the Revised Statutes of the United States, a verdict of guilty was returned against him upon divers counts of said indictment, and judgment and sentence pronounced thereon.

Reference is also made by your petitioner to a petition for a writ of certiorari filed in this court in this cause to bring up the record of the said cause pending in the United States circuit court of appeals for the eighth circuit, your petitioner having taken an appeal to the latter court, owing to the urgency of his situation, not being fully advised as to his rights to an immediate appeal to this court under the acts of Congress relating to appeals and writs of error, and to preserve all of his rights and to secure a review of the manifold errors claimed to have been made in said cause against his rights.

By reference to said petition for the writ of certiorari it will be seen that he would have an appeal therefrom to this court on the questions therein raised and involved, and that this court might, therefore, finally determine this cause. Your petitioner respectfully shows to this court, therefore, that inasmuch as this court shall have to hear and determine this cause finally, it is one of nature and character of such high public concern and interest that it should be heard and determined at the earliest possible moment consistent with the rules and convenience of this court. Under the provisions of the statute, and following the terms of the sentence and judgment imposed upon your petitioner under the verdict above referred to, if affirmed, the office of your petitioner is *ipso facto* vacated, and he is forever thereafter disqualified from holding a position of honor, trust, or profit under the Government of the United States.

Your petitioner, believing said conviction to be against the law and wholly unwarranted by the facts, and the result of manifold errors committed at the trial of said cause, is prosecuting his said appeal earnestly and in good faith. But your petitioner respectfully represents that while the judgment of conviction is pending against him, unreversed, he cannot, consistently with his sense of propriety, appear and take part in the deliberations of the Senate or perform or exercise the duties of his office. It is essential that by the judgment of this court he shall entirely vindicate himself from such charges before he present himself in his place in the Senate to represent his State as Senator and to perform the duties of the office to which he has been elected. Until such determination, therefore, whether favorable or adverse to your petitioner, the State of Kansas will be deprived of his services in their body, and will be represented by but one Senator.

Your petitioner further represents that the matters involved in this cause are those affecting in the most important and urgent manner the duties, privileges, and responsibilities of the Senators of the United States, and should be settled and determined at the earliest possible moment consistent with the rules and convenience of this court.

Your petitioner further respectfully refers to a communication hereto attached from the attorney general of the State of Kansas to this honorable court, joining in this request for the advancement of this cause to an early hearing.

All of which is respectfully submitted.

JOHN F. DILLON,
FREDERICK W. LEHMANN,
W. H. ROSSINGTON,
Attorneys for Plaintiff in Error.

STATE OF KANSAS, EXECUTIVE DEPARTMENT,
OFFICE OF ATTORNEY GENERAL,
TOPEKA, KANSAS.

To the Honorable Supreme Court of the United States:

As the law officer of the State of Kansas, I beg to respectfully and earnestly join in the request of Senator Burton for an early hearing of his writ of error. It is desirable in the interest of the State that if he shall be discharged by your judgment he may return at once to the performance of his duties as Senator from Kansas. If the judgment of the court should be otherwise, it is very important that the legislature which meets in the early part of January approaching should be advised in time to speedily choose his successor; and, from all considerations, that this matter shall be disposed of at as early a date as possible, to the end that the State may have its full representation in the Senate of the United States.

I beg to remain, respectfully yours,

C. C. COLEMAN,
Attorney General.

[N. B.—The original of the foregoing letter is on file in the office of the clerk of this court.]

FILE COPY.

Office Supreme Court U.
FILED
NOV 22 1904
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

JOSEPH RALPH BURTON,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

NUMBER 343.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR THE PLAINTIFF IN ERROR.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
W. H. ROSSINGTON,
FRED. W. LEHMANN,
For Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Streets, New York.

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Supreme Court of the United States.

JOSEPH RALPH BURTON, Plaintiff in Error, vs. THE UNITED STATES OF AMERICA, Defendant in Error.	Number 343.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

The indictment is founded upon Section 1782 of the Revised Statutes of the United States, which is as follows:

"SEC. 1782. No Senator, Representative, or Delegate, after his election and during his continuance in office and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any Department, court martial, Bureau, officer, or any civil, military or naval commission whatever. Every person offending against

this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust or profit under the government of the United States."

The Indictment and Proceeding Thereon.

The indictment is in nine counts. The first count charges that

(a) Burton is United States Senator from Kansas, whose term does not expire until March 4, 1907.

(b) On March 26th, 1903, at St. Louis, Missouri, Burton received from Rialto Grain and Securities Company $500 in money as compensation for services rendered between 22d day of November, 1902, and March 26th, 1903, to the company before the Post-office Department.

(c) In a matter then pending before said department in which the United States was *directly* interested; that is to say:

(d) Whether said company had violated Section 5480 R. S., U. S., in that it had devised a scheme to defraud, which was to be effected by the company in opening correspondence by means of the post-office of the United States, with divers persons resident in the United States, and whether it had in and for executing the scheme deposited any letter or packet in any post-office of the United States.

(e) To the end and for the purpose of enabling Postmaster General to find and determine from evidence satisfactory to him whether he should order St. Louis Postmaster not to deliver letters to Rialto Company, but return them marked "Fraudulent," as authorized by Sections 3929 and 4041, Rev. St., as amended March 2, 1895.

(f) Services of Burton consisted in part of visits by Burton to Postmaster General, Chief Post-office In-

spector and other officers of Post-office Department, and of representations and statements to these officials made with a view and for the purpose of inducing the Postmaster General, the Chief Post-office Inspector and said other officers to decide the question so as aforesaid pending before the Post-office Department in a manner favorable to the company.

2ND COUNT : Same as 1st, except U. S. *indirectly* interested.

3RD COUNT : Same as 1st, except money received from Mahaney, employee of Rialto Company. [On this count the jury returned verdict " not guilty." Rec., p. 24.]

4TH COUNT : Same as 1st, except money received from Dennis. [*Nolle prosequi* entered on this count [Rec. p. 233.]

5TH COUNT : Same as 3d, except Dennis put in place of Rialto Company. [*Nolle prosequi* entered on this count Rec. p. 233.]

6TH COUNT : Same as first, except that it charges that on November 22, 1902, at St. Louis, Mo., the defendant unlawfully accepted and received a check drawn upon the Commonwealth Trust Company of St. Louis, for the payment of money payable to defendant's order, and by the defendant duly endorsed and then and there paid by said Trust Company, in lawful money to the said defendant as compensation for services rendered before the P. O. Department on November 22, 1902, and between that date and March 26, 1903 ; in all other respects this count in the indictment is the same as the counts 1 and 2.

7TH COUNT : Same as 6th, except check is dated December 15th, 1902.

8TH COUNT : Same as 6th, except check is dated January 22d, 1903.

9TH COUNT: Same as 6th, except check is dated February 16th, 1903, and drawn by Mahaney, V. P., of the Rialto Company.

THE GRAVAMEN of each of the offences charged in the indictment is that the Post Office Department had before it pending for decision the question whether a "fraud order" should be issued against the Rialto Company, and that with knowledge of such pending inquiry Senator Burton for compensation rendered services in the matter thus pending with a view and for the purpose of inducing the officials of the Post Office Department to decide such pending matter or case against the issue of such fraud order. Such is the only offense charged in the indictment.

It may here be noted that the 6th, 7th, 8th and 9th counts untruly allege that the said four checks were severally *accepted and received* by the defendant *at the City of St. Louis* and that the money was then and there *paid on the said checks to the defendant in St. Louis.*

Not one of these checks was received by the defendant in St. Louis, but all of them were received in Washington, and the Government afterwards so stipulated (Rec., p. 111), and this is an undisputed fact in the case. It is also undisputed that the defendant transferred all these checks to the Riggs National Bank, Washington, and received immediate credit therefor. It is also an undisputed fact that the money on all of said checks was paid in St. Louis, not to the defendant but to the indorsee or transferee of the checks, the defendant not being present in St. Louis or the State of Missouri when the money was paid on said checks.

SECTION 5480 Revised Statutes forbidding use of the mails to effect any scheme or artifice to defraud, and Sections 3929 and 4041 Revised Statutes, which confer authority upon the Postmaster General to issue what

are called "Fraud Orders" in such cases; also Section 731 Revised Statutes as to venue, and certain relevant provisions of the Constitution of the United States are reprinted in the Appendix to this brief.

THE INDICTMENT was found in the District Court of the United States for the Eastern District of Missouri January 23, 1904 (Rec., pp. 3–19).

The defendant, being in attendance as a Senator for Kansas upon the Senate which was in session at the time, on learning that the indictment was found, and before process was served upon him, appeared on January 27, 1904, in the said court at St. Louis and pleaded "not guilty" (Rec., 19). This plea was withdrawn in order to file the demurrer below mentioned (Rec., p. 20).

The Court overruled a demurrer to the indictment February 13, 1904 (Rec., p. 21. See opinion of the Court on the demurrer, pp. 279-285).

On March 22, 1904, the United States *nolled* the fourth and fifth counts of the indictment (Rec., p. 22).

The defendant again pleading "not guilty," the trial to a jury began, and extended over March 23d, 24th, 25th, until Saturday, March 26th, when the jury retired to consider of their verdict (Record, pp. 20–24).

The jury were in deliberation until Monday, March 28th, when they received a further charge from the Court (Rec., pp. 246–253), and on the same day the jury rendered the following VERDICT (Rec., p. 24):

"We, the jury in the above-entitled cause, find the defendant guilty as charged in Counts One (1), Two (2), Six (6), Seven (7), Eight (8) and Nine (9) of the indictment, and not guilty as charged in Count Three (3). C. W. WALL, Foreman" (Record, p. 24).

Counts one and two are but slightly variant statements of the same alleged offense, yet the jury was permitted to find the defendant guilty on both these counts.

Motion for new trial and motion in arrest of judgment were overruled (Rec., p. 25). The opinion of the Court on the motion for a new trial (see Rec., p. 286).

On April 6, 1904, the Court pronounced the following SENTENCE AND JUDGMENT:

"This day comes the United States by District Attorney and the said defendant being present in court in compliance with the recognizance heretofore entered into by him in this cause and also appearing by Chester H. Krum, Esquire, his attorney, the *Motion for a New Trial* and the *Motion in arrest of Judgment* heretofore filed by the defendant in this cause having been taken up the same are argued by counsel and submitted to the court and the court having considered said motion and being fully advised of and concerning the same It Is Ordered that the said motions be and the same are hereby overruled.

"And thereupon the said District Attorney asks the judgment and sentence of the Court upon the Verdict of guilty heretofore returned by the jury to the charges as contained in the first, second, sixth, seventh, eighth and ninth counts of the Indictment herein and the said defendant having nothing further to say after demand made of him why such judgment and sentence should not be rendered:

"It is therefore now considered by the Court, and as the judgment and sentence of the Court upon the said verdict of guilty so returned by the jury in this cause, that he, the said defendant, Joseph Ralph Burton, make his fine to the United States of America by the payment of the sum of ($2500.00) Twenty-five hundred dollars and also the costs of the prosecution to be taxed and that he, the said defendant be confined and imprisoned in the Iron County Jail at Ironton, State of Missouri, for and during the term of (6) Six Months.

"And the Marshal of the United States, in and for the said Eastern District of Missouri, is hereby directed to deliver the said prisoner, together with a duly certified copy of this judgment and sentence to the Jailer of said Iron County Jail" (Record, pp. 25, 26).

(As to the important questions arising on this sentence and judgment, see POINT V., *infra*, pp. 182–196.)

A BILL OF EXCEPTIONS containing all of the evidence (p. 229) and the rulings of the Court in the progress of

the trial, the charge *and additional charge* of the Court, the defendant's instructions given and refused and the various exceptions, was allowed and is found in the record.

Record, pp. 26 to 253.

Jurisdiction of this Court on this Writ of Error.

From the foregoing sentence and judgment the defendant has taken a writ of error direct to this Court from the District Court of the United States for the Eastern District of Missouri under Section 5 of the Judiciary Act of 1891 (26 Stats., 826), which, *inter alia*, provides for such writ of error " in any case that involves the construction or application of the Constitution of the United States," and " in any case in which the constitutionality of any law of the United States * * * is drawn in question."

(1) This case involves the construction and application of Article III., Section 2, of the Constitution and the Sixth Amendment thereto, whereby the defendant is entitled to be tried by a jury of the state or district in which the crime alleged against him in the indictment was committed, and to be informed of the nature and cause of the accusation.

(2) The case involves the construction and application of said Sixth Amendment, for that the defendant was denied the right which said Amendment to the Constitution gives him, to have the question of his guilt of *the particular charge laid in the indictment* tried and decided by the jury.

(3) This case also involves the construction and application of the following provision of Article I., Section 6 :

" That they [Senators and Representatives] shall in all cases, except treason, felony and breach of the

peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."

(4) This case also involves the constitutionality of Section 731 of the Revised Statutes of the United States as it was construed and applied by the District Court in the present case.

The above-mentioned provisions of the Constitution involved in this case and also said Section 731 of the Revised Statutes are reprinted for the convenience of the Court in the Appendix to this brief.

The several questions arising as to the construction and application of the Constitution and as to the constitutionality of said Section 731 we do not discuss *in limine* at this place, but these questions are discussed under appropriate headings in this brief.

Where a case thus involves the construction or application of the Constitution of the United States or the constitutionality of an Act of Congress, it is well settled by this Court that the case may be brought here on a direct writ of error to the District Court, and that on such writ of error the entire case is open for the consideration of this Court.

STATEMENT OF FACTS AND OBSERVATIONS THEREON.

At the risk of redundancy concerning matters considered in detail in subsequent parts of the brief, we believe it to be important, as an aid to the Court, and by way of immediate understanding of this case, to narrate the facts in chronological order which were adduced at the trial, and which appear upon the record.

Prior to June, 1902, there existed in St. Louis what was known as the *Brooks Brokerage and Commission Company*, a concern engaged in the purchase and sale of grain and stocks upon commission. Major Hugh C. Dennis was at that time the general agent for the three States of Missouri, Arkansas and Kansas of the

Hartford Life Insurance Company, of Hartford, Conn., and had been successfully prosecuting that business for some time.

In June, 1902, Major Dennis purchased the business of this Brooks Brokerage Company from one Charles H. Brooks, who was its organizer, and presumptively, its owner at the time of such purchase.

Major Dennis continued his relationship to his business of life insurance, and after his purchase left the management of the business of the Brooks Brokerage Company to one E. C. Walden, who had been secretary of the company under Mr. Brooks' management, and who, under this arrangement, had charge of all the details of the brokerage business.

About the 27th of July, 1902, Mr. Brooks, who was then in California, wired Major Dennis to the effect that he would repurchase a half-interest in the business, back the business with a credit of $50,000 and add new features to it. This proposition was declined by Major Dennis; whereupon Brooks, who was then in California, started to St. Louis, bringing a lawyer with him, and began what one of the witnesses (Harlan) styled "a fake collection agency," the real object of which was claimed and asserted to be to organize a fight against Dennis and the brokerage business, with a view of compelling him to take Brooks back into the Company or, in the alternative, "to hold him up for a large amount of money."

This action of Brooks was followed by a number of lawsuits, and thereupon Dennis, to obviate the obstacles created by these lawsuits, wound up the business of the Brooks' Brokerage Company and organized a new corporation called the *Rialto Grain & Securities Company*, on the 2d of September, 1902. The stock of this company was owned by Major Dennis. It was regularly organized, under the advice and counsel of Judge Chester H. Krum and Thomas B. Harlan, who were from the date of its organization continuously, attorneys for the company at all times covered by the facts hereinafter narrated.

The purpose of this company was to deal in grain, provisions and securities. See, with reference to foregoing statements, letter of Harlan to Burton, November 18, 1902 (Record, pages 91, 92 and 93), and also the evidence of Harlan (Record, pages 170, 171 and 172), and the charter of the Rialto Grain Company (Record, pages 28, 29 and 30). To distinguish this company from the *Brooks Brokerage Company* it will hereafter in this statement be called for short the *Rialto Company.*

As a result of these controversies, and the effort of Brooks to destroy Dennis, or to control him, an investigation of the Brooks Brokerage Company by the postal authorities was brought about in November, 1902.

Following this very active and bitter fight made against Dennis by Brooks, Dennis was apprehensive that he might be indicted as the then responsible owner of the Brooks Brokerage Company, and began to prepare himself for such a result. It was also feared that such indictment might materially injure the business of the Rialto Company, and particularly so unless the matter growing out of the Brooks Brokerage transactions (with which as it was ultimately shown, by reason of his acquittal, Dennis had nothing to do) should be speedily heard and determined. Such was the condition of affairs on the 17th day of November, 1902. See, in support of this statement, letter of Harlan to Burton (Record, page 92), Harlan's evidence (Record, page 172), Kastor's evidence (Record, page 86).

How Burton Came to be Employed.

H. W. Kastor & Sons is a St. Louis firm extensively engaged in the advertising business, making large contracts for advertisements of all forms of business in newspapers and periodicals. The members of this firm of Kastor & Sons were all friends of Senator Burton, and especially its managing head, Mr. Ernest

Kastor, was and had for a long time been the personal and business friend of Senator Burton.

This firm of Kastor & Sons had also had large advertising contracts from Major Dennis, to advertise the business of the Rialto Company throughout the country. Without Burton's knowledge or procurement Kastor, as a friendly act, advised Major Dennis to employ Senator Burton, and Dennis, acting upon this advice, directed one of his local counsel, Mr. Harlan, to try to engage Senator Burton not only as Dennis' personal counsel in this apprehended indictment in the Federal Courts, but also as the general counsel of the Rialto Company. See testimony of Kastor (Record, pp. 82, 87 and 88).

At that time, Senator Burton was a total stranger to Major Dennis and knew nothing whatever about the Brooks Brokerage Company or the Rialto Company. Neither had he ever before met Mr. Harlan. See Kastor's evidence (Record, pp. 72 and 86), and Harlan's testimony (Record, p. 170). Also the letter of Harlan to Burton (Record, pp. 91 and 92).

The Contract of the Rialto Company with the Defendant.

On the 17th day of November, 1902, Burton was introduced to Major Dennis and Mr. Harlan, while sitting in a carriage in front of the Rialto building, in St. Louis, on his way to the station to take the train for Chicago. There was no talk there, except by way of formal introduction, upon the subject of Burton's employment. Mr. Harlan got into the carriage and accompanied Senator Burton, and the two Kastors, to the station, and Harlan and Burton and Ernest Kastor proceeded on the train to Chicago. It was obvious that no arrangement for the meeting had been made, and in order to discuss the subject of Burton's employment, it was necessary for Harlan to accompany Burton to Chicago. Their conference resulted in an

agreement, subject, however, to the approval of Dennis, but all the terms of this agreement were discussed in detail and settled in this conversation between Harlan and Burton. This agreement was submitted to Dennis on November 18th, and by him ratified (see Letter, page 91 of the Record). Its terms are fully shown in the record and a perfect agreement upon those terms exists in the testimony of Kastor, Harlan and Burton, and there is no testimony contradicting or tending to contradict it.

It was in substance agreed that Senator Burton should act as general counsel for the Rialto Company. Particularly he was to assist in the defense of any criminal prosecution that might be instituted against Major Dennis, growing out of the Brooks brokerage business. In respect to this employment, Dennis and the Rialto Company were by the parties held and regarded as one, Dennis being the substantial owner of the stock of the Rialto Company.

There was developed in this conversation to Senator Burton a plan wherein his services might be particularly useful to the company. At the time of these transactions there were a large number of railroad and other enterprises on foot in various parts of the west, wherein corporate bonds were to be issued and underwritten at a particular sum, by various trust companies, which meant a loan or advancement of money upon a particular valuation of these securities. The Rialto Company had large and valuable lists of names of investors in various parts of the United States, and had unusual facilities for corresponding with these investors, in the way of an office force and the various machinery necessary for such business. It was the purpose of the company to undertake the sale of these securities, upon commission, or for what could be made over a particular sum, and Harlan was enthusiastic with reference to this proposed branch of the business of the new company; and it was by reason of the Senator's relationship and acquaintance that this connection was peculiarly valued with reference to the de-

velopment of the securities feature of this business. This was fully gone over and discussed and was a very important topic of consideration between Harlan and Burton at the time the contract was made. Burton was expected to aid the Rialto Company with the trust companies and other companies in the east in the placing of these securities.

The compensation to Burton was to be $500 a month, payable in advance, and was to continue for a period of not less than five months, the first month to commence on the 18th of November, 1902. It was mutually agreed that the subsequent monthly periods should be changed to begin on the 15th of each month.

This contract was made in this form for the following reason: Burton was unwilling to remain if his services were not desired by the company, and the company might be free to terminate such services at any time; but it was suggested that, inasmuch as the peculiar reason for his employment was the impending criminal proceedings, which might be brought to an end within a very short period, and were in fact ended before the term of his employment had ceased, that he should be paid what would be a reasonable retainer and fee for services in so important a matter, and, therefore, it was stipulated that if he accepted $500 a month as compensation for his services that that compensation should continue for five months at least.

The Contract in Terms Excluded Any Prohibited Services in the Departments.

The only witnesses as to the contract were Harlan, Kastor and Burton. Kastor was called by the Government. Harlan and Burton testified for the defense. For the convenient use of the Court, we herewith append that part of the testimony of these three witnesses which relates to the exclusion from the contract of services in the Departments.

KASTOR, who was called by the Government (p. 78), testified :

" Q. Have you stated, as fully as you can, all that occurred between here and Chicago in reference to this employment, and what occurred? A. I recollect that Senator Burton made a statement regarding that he could not act before the Department.

" Q. Now, have you any definite recollection as to what Senator Burton said in regard to matters before any of the Departments or matters before the Post Office Department? Let us have your best recollection you can afford us. A. I recollect there was a statement made, but I do not know just exactly the language of it. I was not very deeply interested in it—that the Senator stated something, that he could not act in a case before the Department, or words to that effect. I do not recollect exactly.

" Q. Are you able to indicate to the jury how that happened to be mentioned by the Senator? Can you indicate in what connection that indication was given by him? A. It was in the connection that he was to be general counsel. As near as I can recollect at that time that he could act as general counsel. Except—

" Q. That is, he was not to appear in the matters in the Departments? He indicated that, didn't he? A. Yes, sir.

" Q. He was willing to accept employment as general counsel of the company? A. Yes, sir.

" Q. With that limitation? A. Yes, sir.

" Q. That his employment should exclude the idea of his appearing before the Departments? A. Yes, sir.

" Q. That is substantially it? A. Substantially, yes, sir."

See Kastor's evidence, pages 82, 85 and 86.

HARLAN testified (pp. 172, 173, 183) :

" Senator Burton made this statement :

He said, "Now, you must remember I am a United States Senator," and with a degree of severity he said, " I am not going to do anything inconsistent with my duty as a United States Senator.

" I assured him I did not want him, under any circumstances, to do anything inconsistent with his position as United States Senator, and I was just as positive in my statement as he was in his declaration, as far as that matter was concerned.

"Q. What I want to get at is, was there any employment of him proposed to, or accepted by him in the Department, or any of the Departments? A. No, sir. The truth of the matter is, as I made it plain to him, I did not care anything about the Post Office Department, as far as what they might or might not do.

"Q. You mean by that you were not aware of the necessity of the employment of anybody in reference to the Post Office Department. A. There absolutely was no necessity.

"Q. Mr. Harlan, did you ever proceed at any time, as between Senator Burton and the Rialto Grain & Commission Company, that he was obliged or could be required, after his contract, to appear for the company in any matter before the Post Office Department, or any other Department? A. No, sir.

"Q. What I want to get at is, whether you went to the Senator or sent to him on any occasion, on the hypothesis that there was something he was required to do, and accordingly you communicated the matter to him to do or perform? A. It was more on account of my acquaintance with him.

"Q. You say you made these requests more on account of your acquaintance with the Senator than anything else. Were you acquainted with Senator Cockrell? A. No, sir."

See Harlan's testimony, pages 173, 174, 183, 201 and 202.

BURTON testified (pp. 215, 216):

"Now, Mr. Harlan, let me understand you. I am a Senator. This company is using the mails extensively. Is it contemplated in any way that I am expected to use any influence in the Departments, directly or indirectly? His answer was quite emphatic, he said: 'No, Senator, we do not want any influence in the Department. This company has been organized under the direction of myself and Judge KRUM, it is violating no law, it does not intend to violate any law, and we do not want any influence in the Department at all.' That is as nearly as I can recall the language."

See Burton's testimony, pages 215 and 216. And see Kastor's testimony, pages 80, 81, 82, 83, 84, 85, 86, 87, also testimony of Harlan, pages 170 to 202 inclusive.

We have in POINT II. of this brief *(post,* pp. 52–119) carefully extracted from the record every word of the testimony of each and every witness bearing upon, relating or showing what was done by Senator Burton under this employment. It is, therefore, unnecessary at this place to state in detail these facts, but it is proper, before entering upon the argument of this case, to advise the Court of the substance of such proof.

It was shown, and will appear, that Senator Burton was asked to inquire whether it was the purpose of the Department to prosecute Major Dennis in the Federal Courts at St. Louis, by reason of his relation to the Brooks Brokerage Company. This led to Burton's first visit to the Department. Incident to that visit, which was to the office of Chief Post Office Inspector W. E. Cochran, Burton informed Cochran that he was employed as the General Counsel of the Rialto Company, and asked if there were any complaints in the Department against that Company, and was advised by Cochran that two letters had been written, one by Hout and one by Evans, which will hereafter be known in this discussion as the Hout and Evans complaints. The simple fact of these letters was conveyed by Cochran to Burton, with the information that they had been referred to the inspector in charge at St. Louis on the 7th of that month (November, 1902). Thereupon the fact so obtained by Burton was conveyed by Burton to Harlan by letter (November 20), to which Harlan responded (November 22), and in terms informed Burton that these complaints had been by the inspector in charge in St. Louis investigated and found to be without any merit, or, as it was expressed, that there was nothing in them, and that a report to that effect had been made. Harlan did not inform Burton when he was employed about the Hout and Evans complaints (Rec., p. 189), and Burton did not know of them (Rec., p. 220).

At this point we desire to direct the Court's attention to the fact, which is the most pregnant one in this inquiry—namely, that **these two complaints of**

Hout and Evans were the only complaints in the department relating to the Rialto Company of which Burton had at any time during his employment any knowledge, or concerning which the Government sought to prove him as having knowledge or notice.

In brief, it affirmatively appears that no complaints of any sort or character in the Post-office Department were ever known to Burton except the Hout and Evans complaints, and at the very beginning of his employment Burton received positive assurance that there was nothing in those complaints, and that they had been examined and reported against.

Another fact of prime importance, and one that is apparent from one end of this record to the other, is that in all the acts and written words, and words spoken by Senator Burton in and about his employment, or any relationship to the matters of the Rialto Company, he proceeded upon the firm conviction, at all times, that there were no complaints pending in the department against the Rialto Company, because, prior to his employment, the Hout and Evans matters (of which, only, he had knowledge) had been investigated, and found and reported to be without merit.

Another fact that tends to elucidate this inquiry and to establish the position that Burton performed no services in the Post-office Department about the matter charged in the indictment, is the fact that at the time he received his first month's salary, sent in a letter from Harlan, which salary was due and payable before that time, Burton had received in that letter the assurance that the Hout and Evans complaints had been investigated and that it was found that there was nothing in them.

Inasmuch as we have reprinted in this brief under POINT II., all of the evidence in the record upon this question of services, it is unnecessary at this place to go into detail as to the subsequent visits of Senator Burton to the department, in which he had conversation with Cochran, the Fourth Assistant Postmaster

General, or to the Postmaster General, upon matters relating to Dennis or to the Rialto Company, but it is sufficient to say, as characterizing every visit, that it had nothing whatever to do with "a fraud order," or the prevention of a "fraud order"; and in no sense was any testimony as to any such conversations relevant or pertinent to the issue and the sole issue made by the indictment, to wit, that his acts or services were to prevent the issue of such order. On the contrary, all of Burton's errands and visits to the department were on matters totally disconnected from this subject matter, and were absolutely legitimate and proper.

The record fully discloses, and it will be hereafter shown in this brief, in the correspondence and conversations that Senator Burton had with Harlan, that Burton was assured that both the Rialto Company and Dennis were absolutely free from any wrongdoing or evil purpose of any sort or nature, and that they were being unjustly dealt with and accused without ground or foundation by Brooks, of the Brooks Brokerage Company, who sought the Courts as a means to punish Dennis. Dennis' subsequent acquittal, "by direction of the Court," under an indictment later found in St. Louis, a fact which this record discloses (p. 210), would indicate that Harlan's statements and assurances to Burton in this respect were true; and Burton's entire conduct, as disclosed by this record, evinces his belief that they were true (Rec., pp. 216, 217).

It appears, therefore, that Burton's employment came about in a natural way, that it had about it no fact or appearance that rendered it questionable, or would inspire a suspicion in Burton that he was lending his professional services to one unworthy. He was associated with Krum and Harlan, well-known and reputable St. Louis attorneys. It further appears that he did render services, and substantial services, in the matter for which he deemed himself to be specially employed, namely, in the criminal proceedings fomented by Brooks against Dennis, and as general

counsel for the company (see *post*, pp. 114 *et seq.*, as to the nature and extent of such services).

It is unthinkable that if Burton had in mind the rendition of questionable services to a client of questionable character he should have permitted, as he really did, the use of his name upon the stationery of the company as its general counsel. His name thus appears with Judge Krum's and Mr. Harlan's. Harlan visited Washington and had long and elaborate counsel with Burton upon the Dennis case. Subsequently the briefs were brought by Dennis himself to Washington to Burton, who went over them, and afterwards Burton made a trip to St. Louis to still further give counsel, and with a view to preparing for the trial of Dennis. He was counseled with, as appears by this record, in other matters dissociated from the prosecution of the Dennis case and rendered services in that respect.

Each month's pay of Senator Burton was paid in a regular way by check, at the time or shortly after it was due, with the exception of one payment in cash on March 26, 1903. These checks were received by Burton in Washington and by him taken to his bank—the Riggs National Bank in Washington—with his endorsement thereon. The Riggs National Bank received them and placed them at once to Burton's credit. It is obvious that the understanding of both the bank and of Burton was that Burton parted with title to the check, and at the moment credit was given to him ; he himself could withdraw the money at any moment, but could not recall or reclaim the check, which was no longer his property. The checks were all paid upon presentation at St. Louis to the transferees of the bank. (As to the CHECKS and the important questions arising thereon, see POINT III., *post*, pages 120–173.)

Assignment of Errors.

The Assignment of Errors is printed in full in the Record, pages 253–275, and, therefore, is not here repeated at length.

ARGUMENT.

I.

RE "INTEREST OF THE U. S. UNDER SEC. 1782, R. S., AND UNDER THE PROOFS IN THIS CASE.

The United States was not "directly or indirectly interested" in the question whether a fraud order should issue against the Rialto Grain and Securities Company; and, therefore, the Court should have sustained the Demurrer to the Indictment, or should have granted the Motion in Arrest of Judgment, or should have directed a Verdict for Defendant, and should not have instructed that the United States was "interested" as alleged in the indictment (Rec., p. 233).

The language of the statute (Revised Statutes, Sec. 1782) is as follows:

"No Senator, Representative or Delegate, after his election, and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, Bureau, officer, or any civil, military or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States."

This question whether the United States was or was not interested, is raised not only by the demurrer to the indictment (Record, page 20), which was overruled by the trial Court, but also by the motion of defendant to direct a verdict, and also by instructions to the jury (Record, page 233) that the United States was "interested," within the meaning of Section 1782 of the Statutes, in the determination of the question, if there was a question pending before the Post-office Department, as to the issuance of a fraud order against the Rialto Grain and Securities Company, and by the specific exceptions which the defendant took (Record, page 245) to that part of the charge of the Court.

Legislative History of Section 1782 of Revised Statutes, Showing its Occasion and Purpose.

The legislative history of the enactment of Section 1782 of the Revised Statutes supports the view here stated, namely, that Congress when it enacted the statute which is now Section 1782 of the Revised Statutes intended to include only those matters or things in which the United States is a party, or in which the United States as a government has a money or property interest; in the language of Chief-Justice SHAW, below quoted (this brief, page 37), "an interest whereby the United States will gain or lose something by the result of the proceedings."

The occasion for the enactment of this statute was the Civil War and, using the words of the statute, the "proceedings, contracts, claims, controversies, charges, accusations and arrests before Departments, court-martials, bureaus, officers and civil, military and naval commissions," which grew out of the Civil War and which were connected with it, and in which the United States was a party or had a pecuniary or property interest. In most of these cases mentioned in the statute, the United States is a direct party, as in the case of arrest, accusation, charge, contract, claim, proceedings and controversies before court martials, mili-

tary and naval commissions, etc. In order to bring a matter or thing within Section 1782, the United States must either be a party, or it must have a pecuniary or property interest in the matter or thing, or there must be some real interest of the United States as a government by which it will gain or lose something as a result of the decision of the matter or thing.

SENATE PROCEEDINGS.

The bill for the act was introduced into the Senate December 23, 1863, by Mr. WADE (S., No. 28), "Congressional Globe," Part I., First Session 38th Congress, 1863–64, page 93, column 1, where the substance of the bill is stated, and the bill was referred to the Committee on Judiciary and printed.

February 3, 1864 ("Congressional Globe," page 460), Mr. TRUMBULL, from the Committee on Judiciary, to whom the bill was referred, reported it with amendments.

February 10, 1864 ("Congressional Globe," page 555), the bill was taken up for consideration. The Committee on Judiciary reported in favor of striking out the following words:

"No member of the Senate or of the House of Representatives of the United States shall, during his continuance in office, hereafter appear or act as counsel, attorney or agent in any cause or proceeding, civil or criminal, in any court, civil, criminal, military or naval, or before any commission in which the United States is a party or directly or indirectly interested, or receive any compensation of any kind, directly or indirectly, for services of any description rendered by himself or another in relation to any such cause or proceeding."

This amendment, as the "Congressional Globe" shows, prevailed, and those words were stricken out.

The following appear in the course of the debate:

Mr. [REVERDY] JOHNSON (page 555):

"You have extended to courts-martial jurisdiction over almost every variety of crimes. There is hardly

an offense known to the criminal statute which is not more remotely, indirectly or directly of such a character that these courts-martial or military commissions are supposed to have, and certainly assume, jurisdiction. My impression has been, and still is (with no disrespect to the Executive), that these courts-martial are assuming jurisdiction which Congress never contemplated. In all cases of contract to furnish materials to the United States in any Department of the Government, if the Government believe, or have reason to believe, that the party has acted fraudulently in his execution of that contract, he is tried before what they call a military commission," etc.

After this follow pages of debate as to whether or not the word "courts-martial" shall be inserted in the place where it now appears in the statute. Among other things appearing in this debate is the following statement by Mr. HALE (Congressional Globe, page 559):

"Since I have been a member of this body I have seen week after week, and month after month, an advertisement in the journals of this city, the National Intelligencer and some others, of members of the Senate in high standing proffering their services to anybody that had claims against the Government, or against any department of it, and at that time it excited no reproach. That has been condemned now, and against that condemnation I have not a word to say."

Mr. COWAN (Congressional Globe, page 561) said:

"I believe it is proper in making a new law to enquire first what the old law is; second, the mischiefs; and then to look at the remedy. Now, as I understand the mischief which is to be corrected here, it is that members of the Senate and of the House of Representatives are in the habit of appearing in cases where the United States are concerned. I suppose there can be no mischief in their appearing on behalf of the United States. I suppose there is nobody who complains of that here. If there be any mischief at all it must exist in their appearing before certain tribunals, not the judicial tribunals of the country, against the United States."

MR. TRUMBULL said (Congressional Globe, page 561):

"Since this bill has been under consideration I have been informed that money has been paid to procure recommendations to West Point. If that be so, I trust the offender will be brought to justice. Since this bill has been pending, I have heard that officers in the Departments of this Government have received money in order to facilitate claims that were passing through the Departments of the Government. I have heard that where there were many claims pending and it was a great object on the part of the contractors to have their claims acted upon and passed at the earliest day, they have given money to clerks in order to shuffle up their claims, so that they could be acted upon sooner than others."

Again, MR. TRUMBULL said (Congressional Globe, page 561):

"This is not a bill to prevent attorneys from practising in courts of law, but it is a bill to prevent Representatives and Senators in Congress and officers of the Government who are paid for their services from receiving a compensation for advocating claims in the Departments and before the bureaus of the Government, and before courts-martial. That is the particular question that is pending."

Bear in mind right here that Mr. Trumbull was the Chairman of the Judiciary Committee on whose behalf he reported the bill to the Senate, and he had charge of the bill, and he certainly, if any one, ought to know the real purpose of the bill.

HOUSE PROCEEDINGS.

February 17, 1864 (Congressional Globe, page 714), the Act as passed by the Senate (S. B., 28) was taken from the Speaker's table and referred to the Committee on the Judiciary.

June 6, 1864 (Congressional Globe, page 2773), is the following entry:

"SUITS AGAINST THE GOVERNMENT."

"Mr. Wilson, from the Committee on the Judiciary, reported back Senate bill No. 28, relating to members of Congress, heads of Departments and other officers of the Government. The bill was read. It prescribes penalties for members of Congress, heads of Departments, or other officers engaging as attorneys or counselors *in suits against the Government.* The bill was ordered to a third reading; and was accordingly read the third time and passed."

Nothing else appears in the "Congressional Globe," except the entries as to signatures of presiding officers and the report that the bill was approved by the President of the United States, June 11, 1864. The Act itself appears as Chapter CXIX. in the Appendix to the "Congressional Globe" of 1863-4, at page 177.

We maintain therefore that the legislative history of the enactment of this statute, and the language of the statute itself, and the settled principles of law applicable to its construction, show that this statute *was intended to apply to those matters or things and to those matters or things only in which the United States is a party, or in which the United States as a Government has a money or property interest; in the language of Chief Justice* SHAW, *below quoted* (this brief, page 37), "*an interest whereby the United States will gain or lose something by the result of the proceedings,*" and that the statute does not include and was never intended by Congress to include any such question as that of whether or not the mail of a certain person or corporation should be stopped by the issuance of what is called a fraud order, and that the question of the issuance of any such fraud order is not any matter or thing in which the United States is "directly or indirectly interested," within the meaning of this statute.

We proceed to consider the language of said Section 1782.

The restrictive words are "*in which the United States is a party, or directly or indirectly interested.*" Some meaning must be given to these words. The construction placed upon them by the Court gave them absolutely no meaning, as we proceed to show.

The United States has a *pecuniary or property interest* in many things that are before the Departments or officers of the United States, as for example, in the United States domain, lands and buildings, ships, army and navy material, and in other United States property. So also the United States is interested in money claims made against the Government. In most of these cases the United States is a direct party. But in those cases in which it is not a direct party, the United States as a Government must have a pecuniary or property interest in the matter or thing, or there must be some real interest of the United States as a Government by which it will "gain or lose something" as a result of the decision of the matter or thing.

But there are other things before the Departments and officers of the United States in which the United States is not "interested" in any such sense, as, for example, whether a patent shall be issued for an invention, or whether a person's mail shall be stopped and many such things. The statute, Section 1782 above quoted, *necessarily* implies that there are or may be things before the Departments and officers of the United States in which the United States is not "interested," within the meaning of the word "interested" as used in the statute. The prohibition is confined to those things, and to those things only, "*in which the United States is a party, or directly or indirectly interested.*" If the United States is, within the meaning of the statute "*directly or indirectly interested*" in *every* thing which arises before any department or officer of the United States, then these words "*in which the United States is a party, or di-*

rectly or indirectly interested," can have no meaning; for, if omitted, the prohibition would still be the same and would be a prohibition to appear for pay before any Department or officer of the United States "in *any matter or thing* whatsoever." Such is not the language of the statute. Some meaning, therefore, must be given to these words, for it cannot be presumed and it cannot be held that Congress used them without any meaning. These words necessarily carry a limitation. There are, therefore, *some* matters or things before a department or officer of the United States in which a Senator or other officer of the United States may appear for pay. Such things are those in which the United States is *not* "a party, or directly or indirectly interested."

As applied to this case, we maintain not only that the United States is not "interested," within Section 1782, in the issue of a fraud order, but we also maintain that the United States was not "interested" in the subject matter of any of the five visits of the defendant to the P. O. Department, as shown in POINT II., *infra*.

Section 1782 Does Not Say or Mean Things in which the People of the United States are Interested, but Things in which the United States, Meaning the United States, as a Government, is Interested.

All the departments and officers of the United States Government exist for the benefit of the people of the United States, and everything that is before any department or officer or done by them is presumably for the benefit of the people, and in a certain sense the United States is interested in everything that may affect or benefit or injure the people of the United States; but it will not, for this reason, do to say that therefore the United States, within the meaning of the word "interested" as used in the statute, is "inter-

ested " in *everything* that the department and officers of the United States have before them. This would make certain words in the statute meaningless, as above shown. It is a settled and most reasonable canon of construction that every word in a statute and particularly a distinct phrase must have a meaning and be given effect, if possible.

Moreover, the statute does not read " in anything which may affect or benefit or injure the *people* of the United States." The words " United States " in the clause " in which the United States is a party or directly or indirectly interested," mean the United States *as a Government* and not generally the *people* of the United States.

Right here is where the trial Court erred in its decision that the United States was "*directly or indirectly interested*" in the question whether a fraud order should issue against the Rialto Grain and Securities Company. In its opinion (Record, p. 283 *et seq.)*, on the demurrer to the indictment, which demurrer was on the ground, among others, that the matter or thing pending before the Post-office Department in which it was alleged the defendant appeared for pay was not a matter or thing in which the United States was directly or indirectly interested, the trial Court (ADAMS, J.) took the ground that the United States was " interested " in the question whether a fraud order should issue against the Rialto Grain and Securities Company because the United States as a government was bound by its duty to the *people* of the country to enforce the laws. The Court repeated this view in its charge to the jury (Record, pp. 233, 234). But a little reflection will show that the line between what the United States is " interested " in, within the meaning of said Section 1782, and what the United States is not interested in within the meaning of said section can not be drawn on any such ground. By the same reasoning the United States would be " interested " in *all matters whatsoever* before any department or officer of the United States. We have shown above that this can

not possibly be the meaning of the statute, as it would erase and make meaningless words which Congress purposely inserted in it. We have also shown that those words can be given a proper meaning and effect.

Having established the proposition that some matters and things may come before a department or officer of the United States in which the United States is not "interested" within the meaning of that word as used in Section 1782 of the statute, it remains to consider whether the question of the issuance of a fraud order by the Post-office Department against a particular company is a matter or thing in which the United States is "directly or indirectly interested." The United States cannot be interested in the determination of this question in the sense that it has any *money or property* interest in the question. The United States as a government would not "gain or lose" anything by the decision of that question whichever way it might be decided. In short it cannot be "interested" in the question unless the word "interested" in the statute means to include that general interest which the United States has in the welfare of the people, and in the enforcement of the laws for their welfare, and this, as we have seen above, is the only ground upon which the trial Court held that the United States was interested in the matter. But this, as we have seen above, proves too much, and is an inadmissible construction of the statute, for it would wholly nullify the restrictive words "in which the United States is a party, or directly or indirectly interested."

The Kind of Interest of the United States Which is Meant in Section 1782 is Shown by the Things Which the Statute Specifically Mentions, and the "Other Matters or Things" Referred to Are Matters or Things in Which the United States Has a Similar Interest, under the Principle of Ejusdem Generis and Noscitur a Sociis.

The principle or rule here referred to, sometimes called Lord TENTERDEN'S RULE, is as follows:

"Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration, the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that the persons or things therein comprised may be read as *ejusdem generis* with and not of a quality superior to or different from those specifically enumerated."

21 Am. & Eng. Encyclopædia of Law, 1012, and cases there cited, including, among others, *Alabama vs. Montague*, 117 U. S., 602, 610.

The words in Section 1782, to wit, "or other matter or thing," necessarily refer to some other matter or thing of the *same class (ejusdem generis)*, that is, other matter or thing in which the United States has some *similar interest*. These words, "or other matter or thing," were inserted in order that the statute, by enumerating certain things, as "contract," "claim," "charge," "arrest," &c., might not fail to cover other such matters or things in which the United States had a real interest. These words were not intended to enlarge or change the *nature of the interest* which the United States must have, as indicated by the enumerated things, to wit: "proceeding, contract, claim, contro-

versy, charge, accusation, arrest"—all appropriate for the war period and for matters affecting army and navy and civil officers and money and property interests.

In the case of the question of the issuance of a fraud order, what difference does it make to the United States Government whether or not it is issued? The question does affect the person whose mail is under consideration, and it may affect the public or certain people in the United States, but it cannot be said to affect the United States as a Government, or to be a matter in which the United States is interested. If the Court was to say that the United States, within the meaning of the word "interested," as used in Section 1782, is interested in the question whether a certain person's mail be stopped, because the United States is "interested" in the proper enforcement of all laws and interested in the general welfare of the people, then where is there any limit to the matters in which the United States is interested? The United States in such a view would be "interested" in everything that is done by or in or before any Department of the United States Government, else why does the United States require or permit such thing to be done by or in or before any of its Departments? These considerations show that the view taken by the trial Court can not possibly be the correct view unless this Court is prepared to eradicate from the statute the words "in which the United States is a party or is directly or indirectly interested," and thus make this a wholesale prohibition applying not to matters or things only "*in which the United States is a party or is directly or indirectly interested*," but to *all matters or things whatsoever* before any Department. Congress did not so enact.

If the United States is "interested" within the meaning of the statute in the question whether the letters of a certain citizen or corporation shall be stopped, it is impossible to state a matter or thing before any Department in which the United States is not inter-

ested. We repeat, the statute carries a limitation on its face. The view of the Court below disregarded this limitation and expunged these words—not a single word, but a whole clause—from the statute. This will not do. We repeat, this will never do!

All of these words of Section 1782, to wit, "proceeding, contract, claim, controversy, charge, accusation, arrest" are *words appropriate for use in connection with matters in which the United States is a party or has a pecuniary or property interest*, especially when these words are taken in connection with the words which follow, to wit, "before any Department, court martial, bureau, officer, or any civil, military or naval commission whatever."

We have stated above that the trial Court construed this statute as if the words "in which the United States is a party or directly or indirectly interested" had not appeared in the statute. But this is not all. The trial Court construed this statute as if the following words had been wholly omitted from the statute:

"*In relation to any proceeding, contract, claim, controversy, charge, accusation, arrest,* or other matter or thing in which the United States is a party or directly or indirectly interested."

In other words, the Court construed the statute as if it read:

"No Senator, Representative or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered or to be rendered to any person, either by himself or another, before any Department, court martial, bureau, officer or any civil, military or naval commission whatever."

The proposition of the trial Court was that the United States was, within the meaning of the statute, "interested" in EVERYTHING *which has to do with the enforcement of the law.* Another way of stating this

would be, that the United States is "interested" in *everything* with which the United States or any Department of the United States has anything to do; else why would the United States or any Department of the United States deal with such a thing at all? To construe the statute thus would make it an absolute prohibition against appearing at all before any department, etc., for under this view nothing could come before a department, etc., except matters in which the United States was interested. If the United States is, within the meaning of the statute, "interested" in *all* matters that can come before any department, etc., why should not Congress have prohibited a Senator from appearing for pay before a department, etc., *for any purpose whatsoever*. Such is not the prohibition of the statute. And the language of the statute expressing a limitation shows that Congress intended no such absolute and general prohibition.

We are not here asking this Court to lay down any general or universal rule with regard to the construction of Section 1782 of the Revised Statutes, which will cover all possible future cases that may arise under it, nor are we asking this Court to define in general language the kind of interest which the United States must have in order that the thing in which such interest exists may be within the prohibition of the statute. In our judgment the proper method for the Court to pursue with reference to this statute is the method which was so well laid down by Mr. Justice MILLER in the case of *Davidson vs. New Orleans*, 96 U. S., 97, where he said, speaking of the construction of the Fourteenth Amendment of the Constitution of the United States (page 104):

"If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

But, apart from the imminent risk of a failure to

give any definition which would be at once perspicuous, comprehensive and satisfactory, *there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the case presented for decision shall require, with the reasoning on which such decisions may be founded.* This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the Federal government, or limitations imposed upon the States.

As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us :"

Applying this principle of construction to the present case, we maintain that the United States is not "directly or indirectly interested" in the question whether a fraud order should issue against the Rialto Grain and Securities Company. The United States is not a party and has *no money or property interest involved.* It is of course true that if a fraud order were issued and the mail of the Rialto Grain and Securities Company were stopped, the United States, to the slight extent that postage was not received by reason of such mail being stopped, would receive less mail revenue; but it is also true that the United States would perform a correspondingly less amount of mail service, and this one fact would counterbalance the other, so that the United States could not be said to be "interested" for any such reason.

The learned counsel for the United States have utterly failed to point out, and it is in the nature of things impossible to point out, any possible interest which the United States can have in the issuance of a fraud order against the Rialto Grain and Securities Company, unless it be that general interest which the United States has in the general welfare of the people. That such a *general interest* is not sufficient, in a statute that makes it a condition that the United States be

"interested" in order that the statute shall apply, is abundantly shown by the decisions below quoted. We have shown above, however, that such a construction of the statute is inadmissible, as it would in effect strike out certain sentences of the statute and do violence to the intentions of Congress as expressed in the statute.

We, therefore, applying the principles of construction stated by Mr. Justice Miller in the case of *Davidson vs. New Orleans*, above quoted, maintain that the question of the issuance of a fraud order against the Rialto Grain and Securities Company, is not included in this statute as a matter or thing in which the United States is "directly or indirectly interested."

The interest which the United States must have in a matter or thing in order to bring the matter or thing within the prohibition of Section 1782 of the Revised Statutes, must, under the ordinary rules and principles of law which must necessarily govern in cases of this kind, be, in the language of Mr. Chief-Justice Shaw in the case of *Inhabitants of Northampton vs. Smith*, 11 Metcalf, 390, 395, cited on this brief (p. 37):

"One that is visible, demonstrable and capable of precise proof"; one in which the United States "will gain or lose something" by the decision.

Under the general rules and principles of law and the adjudged cases, it is well settled that when the existence of an interest is alleged, the precise nature of the interest must be disclosed by the pleadings or by the proof. A general allegation of an interest or concern in the matter, without showing definitely and precisely how that interest arises or exists, is never held to be sufficient. If the interest exists, it must necessarily be capable of exact and precise allegation and proof.

When Congress referred to a "matter or thing in which the United States is a party or directly or indirectly interested," Congress meant such an interest

on the part of the United States as under the ordinary rules and principles of law is capable of precise and definite allegation and proof. Congress did not mean any such vague interest as a general concern for the general welfare of the people of the United States. If it did mean any such vague general interest or concern, then everything possible which goes on within the borders of the United States, or even outside the borders of the United States, is a matter in which under such a view the United States would be "directly or indirectly interested." But Congress when it passed this statute was not dealing in any such vague generalities.

Congress Used Words Which Under the Decisions of the Courts of This Country and of England had a Technical Meaning, and Therefore Congress Must Have Used Them in Such Technical Meaning.

This statute was carefully considered by the Judiciary Committee of the Senate, a committee consisting of eminent lawyers. It was reported by the Judiciary Committee, by Senator TRUMBULL of Illinois, an eminent lawyer and judge; and all of these members of the Judiciary Committee as well as the other lawyers of the Senate must have understood that the word "interested" in the statute was used in the ordinary legal sense in which the word interested had been used time and again in the statutes in every State in this country. There is no purpose shown in the statute and no purpose shown in the debates of Congress when it enacted this statute of departing from the ordinary and well-settled meaning of this word "interested" as it had been declared by numerous and uniform decisions of the Courts in this country as well as in England.

Adjudged Cases Showing the Legal Meaning of Word "Interested," as Used in Statutes.

The word "interest" or "interested" as used in Section 1782 Rev. Stats. had a well-settled legal meaning well known to the lawyers who framed that section, which meaning is in direct conflict with the opinion and decision of the trial Court in this case.

The case of *Inhabitants of Northampton vs. Smith*, 11 Metcalf (Mass.), 390, involved the construction of a statute of Massachusetts which provided, page 393, "that when a judge of probate shall be *interested* in any case within his jurisdiction, the case shall be transferred to the probate court of the most ancient adjoining county." The facts and the decision of the Court are sufficiently stated in the opinion of Chief-Justice SHAW as follows (page 393):

"This was an appeal from the decree of the judge of probate of the county of Hampshire, by which he declined, on account of interest, to take jurisdiction of the probate of the will of Oliver Smith, late of Hatfield, and directed the proceedings upon said will to be transferred to the court of probate of the County of Worcester, being the most ancient adjoining county. This objection is founded upon the provision of the Rev. Sts. c. 83, Sec. 15, directing that when a judge of probate shall be interested in any case within his jurisdiction, the case shall be transferred to the probate court of the most ancient adjoining county. The interest of the judge was supposed to arise from the fact, that he was one of the inhabitants of the town of Amherst; that there were, in this will, many bequests to charitable purposes, for the use and benefit of classes of persons described as dwelling in eight towns enumerated, of which towns Amherst is one; that if those bequests were beneficial to these towns, they had an interest, in their corporate capacity, in establishing the bequests, and of course in proving the will; and that by means thereof, Mr. Conkey, the judge of probate, as an inhabitant of Amherst and a member of

the corporation, had a derivative interest in the same bequests.

* * * * * *

(p. 394) "II. But the great question, and the one raised on the appeal, is, whether the judge of probate, as an inhabitant of the town of Amherst, and a member of that municipal corporation, had such an interest in this will, within the meaning of the statute, as to supersede his jurisdiction of the probate of the will, and transfer it to another county.

"It is true that the plain dictates of natural justice, independently of all articles of *magna charta*, bills of rights, or other provisions of positive law, require that a man shall not be judge in his own cause. And it is only a just application of this principle, that he shall not sit in judgment in deciding a question, in which he has a personal interest. But this, like all other very general propositions, in order to make it the basis of a practical rule, must have a reasonable construction, and must be taken, not as absolute and invariable, but with all necessary and implied qualifications. *If the term 'interest' were used in the loose sense it sometimes is, consisting in a strong and sincere desire to promote all enterprises for the advancement of learning, philanthrophy, and general charity, or a similar interest, with all good men, to repress and put down pernicious and mischievous schemes, no man could be found, fit to be intrusted with the administration of justice; for no man can be exempt from such interests.* But even where there are pecuniary interests, there must be some exceptions; as when the Commonwealth is a party in a criminal prosecution or a penal action, where the penalty enures to the State, and all civil suits on recognizances and other debts, or for the recovery of property, every citizen has a pecuniary interest. And yet none but citizens can be judges. Our own declaration of rights has made some approximation towards a limitation of the generality of the maxim, by declaring (art. 29) that 'it is the right of every citizen to be tried by judges as free, impartial and independent, as the lot of humanity will admit.' It is obvious that no nearer approximation to the rule of absolute impartiality can be made, by any system of laws.

"We are then to consider what is the nature of the interest, intended by Rev. Sts. c. 83, Sec. 15, which shall take the case out of the jurisdiction of the judge of probate, and transfer it to the court of probate of an adjoining county.

"1. We think it is not to be a mere possible, contingent interest; not an interest in the question or general subject, to which the matter requiring adjudication relates, but one that is visible, demonstrable, and capable of precise proof (*Cottle, Appellant*, 5 Pick., 483; *Sigourney v. Sibley*, 21 Pick., 101, and 22 Pick., 507). It is not the bias or prejudice which would be sufficient to set aside a juror (*Davis v. Allen*, 11 Pick., 466). It is to be considered that such an interest, in the judge of probate, is not only to oust him of his jurisdiction, but is to confer jurisdiction on another court of probate, which otherwise would not have it. It must therefore depend upon facts capable of being precisely averred and proved, and thus put in issue and tried. The importance of this consideration will be appreciated, when it is considered, that if jurisdiction is taken by a probate court, not entitled to it by law, the entire proceedings are void; the practical consequences of which may be extensively injurious (*Holyoke v. Haskins*, 5 Pick., 20; *Coffin v. Cottle*, 9 Pick., 287).

"2. It must be a pecuniary or proprietary interest, a relation by which, as a debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling, or sympathy, or bias, which would disqualify a juror (*Smith v. Bradstreet*, 16 Pick., 264).

"3. It must be certain, and not merely possible or contingent (*Hawes v. Humphrey*, 9 Pick., 350; *Wilbraham v. County Commissioners*, 11 Pick., 322; *Danvers v. County Commissioners*, 2 Met., 185). It must be direct and personal, though such a personal interest may result from a relation, which the judge holds as the member of a town, parish or other corporation, where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings.

"*It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test by which to decide so important a question as that of jurisdiction; it would not be capable of precise averment, demonstration and proof; not visible, tangible or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action.* It is like

the principle applying to the case of the competency of a witness; a direct pecuniary interest, however small, on being proved, renders him incompetent; but the strongest interest from sympathy, from interest in the question, and even an expected interest in the property in controversy, not yet vested, does not render him incompetent.

On examining this will of Oliver Smith, we cannot perceive that it vests any pecuniary interest, legal or beneficial, in the towns named, other than Northampton. The will provides for the future annual distribution of considerable sums of money in charity for the relief and assistance of various classes of indigent persons to be selected from those residing within the limits of these towns. But the distribution of a sum of money within the limits of a town, although it may give a spring to business, and indirectly benefit the inhabitants, as members of society, and holders of property, yet is not a direct pecuniary interest to the town in its corporate capacity, through which its members derive a pecuniary interest. And although it may be said, in a loose sense, that such a provision for various classes of persons, and the distribution of so much money, would be of great benefit to the town, and although the inhabitants of such town would feel strongly inclined to aid in promoting and establishing such a charity, and even be willing to pay money in securing it, yet, when strictly considered, it means only that such an establishment would be useful and beneficial to the dwellers in such town; not that it would confer any corporate right upon the town. It affords no direct or necessary exemption from taxes. It is the same interest which the inhabitants of a town often feel and manifest in the establisment of a college, academy, hospital, and even a court house and jail, within their limits.

The Court are therefore of opinion that the town of Amherst, as a municipal corporation, in its corporate capacity, takes no pecuniary interest, legal or beneficial, under this will, and that, of course, Mr. Conkey, Judge of Probate, as an inhabitant of that town, takes no such interest; that he is not prevented from taking jurisdiction of the probate of this will, and that no other probate Court of the Commonwealth can take jurisdiction of it.

The decree of the probate Court is reversed, and the case remitted to that Court for further proceedings in

the probate of said will, and the settlement of the said Oliver Smith's estate."

A very pertinent case is that of *McGrath vs. The People ex rel. Linnemeyer*, 100 Ill., 464. The case and the decision on this point are stated accurately in the second paragraph of the headnote, as follows :

" The State is not ' interested, as a party or otherwise,' in a proceeding in the nature of a *quo warranto* to try the title of a person to an office into which it was alleged he had intruded, in any such sense as would give to the Supreme Court jurisdiction to hear an appeal in such a proceeding directly from the trial court, under Section 88 of the Practice Act. The interest which the State must have in a cause, within the meaning of this section, in order to entitle either party to bring it directly to the Supreme Court from the trial court, is a substantial interest—as, a monetary interest."

This is directly contrary to the views taken by the trial Court in the present case. The trial Court in the present case held that the United States was interested in the question of the issuance of a fraud order, because of its general interest on behalf of the people that the laws should be enforced. In this *quo warranto* case of *McGrath vs. The People* the Illinois Supreme Court held that the State was not " interested, as a party or otherwise," in a *quo warranto to try title to an office created by the laws of Illinois*. This holding is utterly at variance with the holding of the trial Court in the present case, that a general interest or concern that laws should be enforced, is enough to make the United States Government " interested," within the meaning of Section 1782 of the Revised Statutes, in the question whether a person's mail should be stopped.

In the case of *Evans vs. Eaton*, 7 Wheaton, 356, a question in this Court was whether a Mr. Frederick was a competent witness, the alleged objection to him

being that he was interested in the cause. This Court, however, held that he was not interested and that he was a competent witness. Mr. Justice STORY, giving the opinion of the Court, said (page 425):

"If the patent is declared void, the invention may be used by the whole community, and all persons may be said to have an interest in making it public property. But this results from a general principle of law, that a party can take nothing by a void patent; and so far as such an interest goes, we think it is to the credit and not to the competency of the witness."

It appeared in this case that Mr. Frederick was in a business where he might make use of the article alleged to be patented if the patent were to be declared void, and that in a certain sense he had an interest to have it declared void. On this point the Court, speaking by Mr. Justice STORY, said (page 425):

"But the special notice in this case asserts matter, which if true, and found specially by the jury, might authorize the Court to adjudge the patent void; and it is supposed that this constitutes such an interest in Frederick in the event of the cause that he is thereby rendered incompetent. But in this respect, Frederick stands in the same situation as every other person in the community."

In the case of *State vs. Sutton*, 74 Vt., 12, the case and decision are sufficiently stated in the following extract from the opinion of the Court:

"This is an indictment under Section 5072 of the Vermont Statutes, for defaming this court, and a judgment thereof, and the judges of the court as to said judgment. It is objected that Judge WATSON, who sat below, was disqualified by reason of interest in the event of the cause or matter, for that he is one of the judges alleged to have been defamed. It is a pecuniary interest that disqualifies, and Judge WATSON is no more interested in this case in that respect than he is in every other criminal case that he tries, and that interest is too small for the law's notice. *State v. Batchelder*, 6 Vt., 479. It is said that a judge defamed

would be deeply interested to have the respondent convicted, not only that he might be severely punished, but also for the aid it might afford him in the prosecution and maintenance of a civil action for damages. But such an interest does not disqualify," etc

In the case of *Foreman et al v. Town of Marianna*, 43 Arkansas 324, the Court held that a judge who was a taxpayer in a town was not disqualified to sit in a case relating to the annexation of the town to a municipal corporation. On this point the Court said (page 329):

" It is objected here that the County Judge was disqualified, being a citizen and a tax-payer of the town. It does not appear that his authority was challenged by any proper motion in the County Court, and we are free to say, that if it had been the objection ought not to have prevailed. It may be hoped that every good Judge in the State is deeply interested in everything that may help or hurt the community; and that he will favor the former and oppose the latter in all legitimate ways. Here the question is not one of taxes and burdens, but one of police. It does not even appear that, on the whole, the result of annexation, would be to increase or diminish taxes. But that is of no importance. This not a suit of a personal nature, concerning property or rights of persons. A general interest in a public proceeding, which a Judge feels in common with a mass of citizens, does not disqualify. If it did, we might chance to have to go out of the State, at times, for a Judge. The interest which disqualifies a Judge, under the Constitution, is not the kind of interest which one feels in public proceedings, or public measures. It must be a pecuniary or property interest, or one affecting his individual rights; and the liability or pecuniary gain or relief to the Judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of laws and government upon the *status* fixed by the decision."

In the case of *Taylor et al. vs. Commissioners of Highways of Town of Normal*, 88 Illinois, 526, the

Court stated the question involved and the decision as follows (page 527):

"The only question of any importance presented by this record is, whether a person has a right to appeal from the decision of the commissioners of highways in laying out a new road or vacating an old one, who does not own land adjoining the road laid out or vacated.

The statute which authorizes an appeal from the decision of the commissioners of highways to three supervisors, provides, '*any person or persons interested in the decision of the commissioners of highways* in determining to, or in refusing to lay out, alter, inclose or vacate any road, or revoking any previous order or decision relative to any road, or from the verdict of any jury in assessing damages in opening, altering or vacating any road, may appeal from such decision to three supervisors of the county,' etc. The word "interested" must receive a reasonable construction, such as will, on the one hand, protect those who have a direct and substantial interest in the matter, and, on the other hand, protect the commissioners of highways from unnecessary litigation in defending their action as such, at the suit of persons who may imagine they have an interest, when in fact they have no such interest as was contemplated by the legislature. Every citizen of a county, in one sense, has an interest in the public highways. So, too, it may be said, and properly, that every citizen of the State has an interest in the highways in the different counties of the State. If, therefore, the language of the statute is to be interpreted literally, an appeal might be taken by any citizen of the State. But we apprehend it was not the intention of the legislature that the word "interested" should receive such a liberal construction. It was, doubtless, intended to give the right of appeal to those persons who had a direct and pecuniary interest not shared by the public at large, such as owned land adjoining the new road laid out or the old one vacated. * * *

We are, therefore, of opinion that no person has the right of appeal except those who may own lands adjoining the road to be laid out or vacated."

Chicago, Burlington and Quincy Railroad Company vs. Kellogg, 54 Neb., 138, was a suit to vacate a judg-

ment rendered against the railroad company in an action at law for damages. The facts are stated in the opinion of the Court as follows (page 404):

"The Honorable F. B. BEALL was the judge who presided at the trial of the law case, and he also presided at the trial of the case at bar. When this case came on for trial, counsel for the railway company objected to Judge BEALL hearing it, claiming that he was interested, and therefore disqualified from hearing this case. The railway company's objections were overruled, and Judge BEALL heard and determined the case at bar; and this action is the first argument made here for a reversal of the judgment. Section 37, c. 19, Comp. St., provides that: "*A judge * * * is disqualified from acting as such * * * in any case wherein he is interested * * *.*" But the word "interested", found in this section of the statute, probably means "pecuniarily interested", or at least it means that a judge, to be disqualified from hearing a case, must be in such a situation with reference to it or the parties that he will gain or lose something by the result of the action on trial. It is not claimed that Judge BEALL will gain or lose anything from the result of this action. It is not pretended that he has any pecuniary interest in the matter. The argument seems to be that, because he rendered a law judgment, he would naturally be desirous that the same should be sustained, and that, therefore, his inclination would be to defeat this suit. It can never be presumed that a judge will permit his desires or inclinations to control his decision in any manner; and that he tried the case and rendered the judgment which is sought to be vacated by this action does not render him interested and disqualified, within the meaning of said section of the statute."

In the case of *Sauls vs. Freeman*, 24 Fla., 209, the statute in question, as stated by the Court (page 527), "provides that no judge of any Court or justice of the peace shall sit or preside in any cause in which he is a party, or *in which he is interested*" etc. The Supreme Court of Florida held that the fact that the Circuit Judge, with other registered voters of the country, signed a petition addressed to the County Commis-

sioners, asking for the change of the county site, did not disqualify him on the ground of interest from sitting in a mandamus proceedings instituted by some of the petitioners to compel the commissioners to call an election on the question of changing the county site. The Court said (page 528), " The interest meant by the statute is property interest "—citing numerous cases.

In *Bowman's* case, 67 Missouri, 146, a disbarment proceeding, it was held that the fact that the Judge trying the case was an honorary member of the Bar Association of St. Louis which preferred the charges, did not disqualify him as one interested. The Court said, NAPTON, J., (page 150) :

" We are of opinion that the position of Judge BOYLE, as an honorary member of the Bar Association, did not disqualify him from sitting in the case, since he had not a particle of pecuniary interest involved."

Scores of similar cases to the same effect might easily be cited. It is enough, however, merely to call the attention of this Court to this well-established meaning of the word " interested."

This Statute, Section 1782, is a Criminal Statute, and is to be Interpreted as a Criminal Statute.

If there exist any doubts as to the true construction of the statute, and if under one fair construction of the statute an alleged act is innocent, and if under another possible construction of the statute an alleged act is criminal, then that construction must be given to the statute under which the act is innocent. Any other course would render the statute a trap for the unwary. The statute, like any other statute and

especially a statute which makes an act a crime, and especially a statute denouncing fines, imprisonment, forfeiture of office and perpetual infamy, must be strictly construed. Such a statute must look out for itself. If an alleged act is not *clearly* within the prohibition of the statute, then on the general principle of the presumption of innocence and of fairness to an accused person, it must be held that such alleged act is not within the language of the statute.

Applying these principles of construction to the present case, if we adopt the *ordinary and well-settled meaning* which has been given to the word "interested" as it appeared in the numerous statutes of the States, namely, to indicate a pecuniary or property interest, an interest whereby the United States gains or loses something, then the question whether the mail of the Rialto Grain and Securities Company should be stopped is clearly not a matter or thing in which the United States is a party or directly or indirectly interested. Any other construction of the word "interested" opens wide the door, so that it would be impossible to draw the line anywhere so as to exclude any matter or thing whatsoever as a matter or thing in which the United States was not interested. Any such construction would be a departure from the "interest" which Congress had in mind, as shown by its legislative occasion and history when this bill was enacted, and would be a departure from the well-settled legal meaning of the word "interested" as it was used in law and in statutes when this statute was enacted.

It is to be taken into consideration, too, that this statute, Section 1782, even in those things in which it clearly applies, deals not with a thing which is an evil in itself, *malum in se*, but with a thing which, for supposed motives of public policy, it is wise to prohibit—*malum prohibitum*. There is no reason or necessity, therefore, in the nature of things, why any Court should seek to include within the language of the statute any-

thing except what is clearly and unquestionably included therein.

In the case of *United States vs. Wiltberger*, 5 Wheaton, 76, an indictment for manslaughter under a United States statute, this court, Chief Justice MARSHALL giving the opinion, said (page 95) :

"The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals ; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."

In *United States vs. Sheldon*, 2 Wheaton, 119, a question arose under a penal statute of 1812 which prohibited "transporting," &c., between the United States and Canada, whether the driving of living fat oxen was "*transporting*" such oxen within the meaning of the statute, and the Court held that it was not. The language of the statute was (page 120) :

"That if any citizen of the United States, or person inhabiting the same, shall transport or attempt to *transport*, over land or otherwise, in any wagon, cart, sleigh, boat, *or otherwise*, naval or military stores, arms or munitions of war, or any articles of provision from the United States to Canada," etc.

The Court held that living fat oxen were articles of provision and munitions of war. The Court, however, held that the driving of oxen over land was not "*transporting*" them "in any wagon, cart, sleigh, boat, *or otherwise*." This case furnishes a very pertinent illustration of the rule that in order that an act may be construed to be within a penal statute, it must clearly be within it, and that courts will never construe an act as within a statute unless it is clearly so. In this case the evil consequences of the act to the United States were just as great whether the cattle were driven over land on foot or whether they were carried in wagons, but the Court, of course, held that

it could not punish the act unless it was clearly within the statute.

So in the case of *United States vs. Morris*, 14 Peters, 464, a case of indictment under a statute prohibiting the slave trade, this Court, Mr. Chief Justice TANEY giving the opinion, said (page 475):

"In expounding a penal statute the Court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly."

In the case of *United States vs. Clayton*, 2 Dillon, 218, the Circuit Court (DILLON and CALDWELL, JJ., sitting), held that Powell Clayton, Governor of the State of Arkansas, was not an "officer of election," within the meaning of a penal act of Congress, although it was a part of his duty to issue and he did issue a certificate of election. The Court said (page 225):

"It belongs only to the legislative department to create crimes and ordain punishments. Accordingly, courts, in the construction of statutable offences, have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the legislature, lest otherwise they shall hold an act or an omission to be a crime, and punish it, when, in fact, the legislature had never so intended. 'If this rule is violated,' says Chief Justice BEST, 'the fate of the accused person is decided by the arbitrary discretion of the Judges and not by the express authority of the laws' (*Fletcher vs. Lord Sondes*, 3 Bing., 580).

The principle that the legislative intent is to be found, if possible in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizen. The courts have no power to create offenses, but if by a latitudinarian construction they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere

verbal and sharp criticism, nevertheless the doctrine is fundamental in England and American law, that *there can be no constructive offenses ; that before a man can be punished his case must* be plainly and unmistakably within the statute, and if there be any *fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused.* These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the supreme court of the United States *(United States v. Morris,* 14 Pet., 464 ; *United States v. Wiltberger,* 5 Wheat., 76 ; *United States v. Sheldon,* 2 *ib.,* 119. And see, also, *Ferret v. Atwill,* 1 Blatchf., 151, 156 ; Sedgw., Const. and St. Law, 324, 326, 334 ; 1 Bish. Cr. Law, secs. 134. 135)."

This statute, Section 1782, has been on the statute books since 1864, and so far as we have been able to learn, the prosecution of the defendant Senator BURTON is the first prosecution that has ever been had or attempted under this statute. We venture to state our judgment that before this prosecution was begun there had been scores of instances where members of Congress who were lawyers had made for their clients inquiries in the Departments, in the same way that Senator Burton made inquiries in the present case—inquiries not at all connected with any matter in which the United States was a party or had any pecuniary or property interest. But inquiries which concerned only private persons or corporations—and that no one of such members of Congress ever supposed that he was thereby doing anything prohibited by Section 1782 of the Revised Statutes, because he had not the remotest idea that the United States was " a party or directly or indirectly interested " in the matter of his investigations or the matter in which his services were thus rendered.

Conclusion as to "Interest" Stated.

For these reasons we maintain that the Court erred as stated in POINT I., *supra* (p. 20) in holding that the United States was "interested" in the question whether a fraud order should issue against the Rialto Company, and therefore the whole basis of the indictment fails.

Further Special Point as to "Interest."

BUT IF IT BE OTHERWISE, we maintain that the United States was, at all events, not "interested" in any matter or thing before the department which was the subject matter of any of the visits, inquiries or statements of the defendant in the Post-office Department, which matters or things had no reference to any fraud order, but related wholly to other matters or things which were legitimate and proper, and not prohibited by any possible view of Section 1782, even if such matters or things had been alleged (as they were not) in the indictment. This is shown by the evidence, which we proceed to consider at large in our next POINT.

II.

TOTAL FAILURE OF PROOF OF CHARGE.

There was no evidence in the case to establish the guilt of the defendant of the offenses charged in the indictment or any of them, or of any offense whatever, and the Court erred in refusing at the close of the Government's case (p. 165), **and also at the close of the trial to direct the jury to return, as to each count, a verdict of not guilty** (p. 229).

COCHRAN testifies (Record, pp. 146, 147) as follows:

"Q. At any time from the beginning of Senator's Burton's indication to you that he had any connection with the Rialto Grain and Securities Company, there was no discussion between you and him, was there, as to the issuance or non-issuance of a fraud order as it is called, against the company? A. I think not.

* * * * * * * *

"Q. I understand you, then, that you are not able to recall any occasion upon which the Senator made any representation to you or had any conversation with you with reference to the issuance of a fraud order? A. No, sir.

* * * * * * * * *

"Q. There was no discussion between you was there, on this occasion, of the merits of the representations of Mrs. Evans or Mrs. Hout? A. No, sir.

* * * * * * * * *

"Q. It is a fact, isn't it, as you recall, this occasion when senator was advised of these two complaints [of Hout and Evans], was the only one upon which he was advised of any complaints having been lodged against the company? A. That is my recollection of the matter."

Testimony of WILLIAM E. COCHRAN, *Chief Post-office Inspector, at Washington, the Government's witness to sustain the charge in the indictment.*

THE CHARGE AND ONLY CHARGE IN THE INDICTMENT is that the defendant "rendered services in the Post-Office Department for compensation," in a matter or thing pending in the department, which matter or

thing was whether a "fraud order" should issue against the Rialto Company, and which services so rendered were rendered to induce the department to make a decision of such fraud order inquiry favorable to the Rialto Company.

Under this POINT we undermine the whole foundation of the prosecution on the merits. We show from the record that the defendant rendered no service whatever in the department having any reference to the issue of a fraud order. We show from the record that the defendant did not even know that any fraud order inquiry was "before" the department or was "pending" for decision therein. If it be a fact that any such inquiry was pending for decision, we establish affirmatively that the defendant did not even know of the pendency of any such inquiry. We shall show from the record that not one of the five visits of the defendant to the department had the slightest reference to the issue of a fraud order, and that every one of such visits related distinctly to other matters than the issue of a fraud order, and we go further and show that every one of such visits was for a perfectly legitimate and proper purpose.

The Government by its testimony shows five occasions only upon which Senator Burton made visits to or had communication with William E. Cochran, Chief Post-office Inspector, four of which communications with this officer were had upon visits made by Senator Burton to the Post-office Department, and one in Senator Burton's office in Washington at the instance of Senator Burton. Cochran is the only witness the Government produced who testified about the visits and communications of Burton to or with the department, except that Cochran's private secretary (Record, page 148) testified to being present at one occasion. It is our purpose under this point to show from the testimony the occasion of each visit, the purpose of each visit, and what conversation was had and *all* that was said or done between Burton and Cochran or any official of the Post-office Department. This we shall

do from the testimony, referring to the pages of the record where the same can be found and omitting not the slightest word in the record that can throw any light upon this inquiry.

So far as the record shows, no other act was done or statement made than was involved in these visits and no other word fell from the lips of Senator Burton touching or respecting the question at issue than we shall present to the Court in the summation to follow. Our object is palpable, and we frankly state at the outset that not a syllable of this proof sustains the charge of the indictment that Senator Burton performed any services, or did any act, overt or covert, or made any statement or representation which might, could, would, or should influence the action of the department in granting or refusing the fraud orders as alleged in the indictment.

It is our further purpose to assert as matter of law flowing from this proof and all this proof that nothing that he did was within the prohibition of Section 1782, or even tended in the slightest degree to the violation of that act in letter or in spirit.

A.

The first visit of Senator Burton to the department, November 20, 1902.

RE DENNIS INDICTMENT.

Following Senator Burton's employment (the occasion and purpose of which is fully made clear in another part of this brief) (p. 8 *et seq.)* which employment was effected by agreement on November 18, 1902, Senator Burton received from Harlan the letter of that date to be found on page 91 of the record, which was the first communication he had from either Dennis or the Rialto Grain and Securities Company, or any one for

them, after Burton's employment. This letter closes with the following words:

"I do not know what reports have been sent into the Post Office Department at Washington, nor am I prepared to say that the Government intends to make a case against Major Dennis; but if you can find it convenient to inquire of these facts at the Department, you may be able to perform for us a great service at this time. Should any action be taken here by the Grand Jury, I will wire you at once."

This letter is fully explained in another part of our brief (p. 98). Upon receipt of that letter, Senator Burton visited the department and sought to obtain from Mr. Cochran the information asked for. The testimony relating to this visit is as follows: W. E. Cochran (Record, page 140) testifies:

"Q. You have been sworn in this case? A. Yes, sir.

Q. And your name has been given to the jury? A. Yes, sir.

Q. I will get you to state, Mr. Cochran, whether, at any time between the 18th of November, 1902, and the 26th day of March, 1903, you saw the defendant, Senator Burton, at the Post Office Department in Washington? A. Yes, sir; I did.

Q. Will you state to the jury the first time that you saw him there when any allusion, if any such was made, was made to you in reference to the Rialto Grain and Securities Company?

A. I cannot fix the date of the first visit from any independent recollection; but my best recollection is that the first visit was made before that case had been sent out for investigation (Error of Witness on this Point, see Rec., p. 216).

Q. Do you recall any visit that was made to the Department in reference to the complaints of Hout and Evans, and whether you gave him any information as to the pendency of those complaints? A. Yes, sir; he called at the department some time after the case had been made up, and I told him that the case had been made up and sent out for investigation, and gave him the names of the complainants.

Q. Was that the first visit to the Department in reference to the matter, or had he been there before?

A. I stated that my recollection was that he had made a visit of inquiry before any case had been made up and sent out for investigation.

Q. Can you state what he said, in that inquiry, substantially?

JUDGE KRUM: I submit that is not material in this case; that was before anything had been begun, on the theory of the Government.

Objection sustained.

COL. DYER: Q. What transpired at this interview, when you told him of the complaints of Hout and Evans, and the case being made up against the Company, any further than that? A. He said that all the difficulty arose from Major Dennis's connection with the Brooks Brokerage and Commission Company. I will have to correct that—that all the trouble arose from that company, and that Maj. Dennis had succeeded and formed a new company which had taken over the business of the old company.

Q. What, if anything, did he say with reference to the Rialto Grain and Securities Company that had been organized after the Brooks Brokerage Company had been organized? A. He said that Company was doing a straight business and was all right."

The foregoing is *all* of Cochran's testimony in chief as to the visit of Nov. 20.

In the examination and cross-examination of Mr. Cochran the several visits were discussed and the following admissions of Cochran on his cross-examination are to be found which include and characterize and limit the conversation and discussion at all of the visits (Record, page 146): In reading this testimony it is to be borne in mind that Cochran is the only witness by whom the Government sought to prove that Burton rendered the alleged "services" before the P. O. Department:

"Q. I understand you, then, that you are not able to recall *any occasion* upon which the senator made any representation to you or had any conversation with you with reference to the issuance of a fraud order? A. No, sir.

Q. I understood you correctly, didn't I, Mr. Cochran, that at the time of Senator Burton's first inquiry, that is in regard to these two letters from the ladies in

Albany, Mrs. Hout and the other one, those letters had already been referred in the course of the business in the Department, to St. Louis, and were in the hands of the inspector there. Was that correct, or hadn't that happened at that time? A. No, sir; I stated my best recollection was that the senator had made inquiry before any complaint whatever had been received [Witnesses' Error, Rec., p. 216].

Q. I know. But the inquiry he made after the complaints were in, was made after these complaints had been sent out to St. Louis? A. Yes, sir.

Q. So they were not pending before you, or pending before any officer of the Post Office department in Washington? A. Well, they were in the hands of the inspector in charge at St. Louis.

Q. That is what I mean, they were out here? A. Yes, sir.

Q. The senator, therefore, was not shown those letters upon the occasion of his visit to your office for the purpose of that inquiry because they were here, and of course would not be shown to him in Washington? A. No, sir; the only information I could give him was the carbon, which would simply have on it the name of the complainants.

Q. You could give him that information and that was all the information you could give him there? A. Yes, sir.

Q. There was no discussion between you was there, on this occasion, of the merits of the representations of Mrs. Evans or Mrs. Hout? A. No, sir.

Q. The only thing that was indicated to the senator by yourself was that, as appeared by this wrapper, these two complaints had been filed and had been referred to the proper officer in St. Louis? A. Yes, sir.

Q. It is a fact, isn't it, as you recall, this occasion when Senator was advised of these two complaints, was the only one upon which he was advised of any complaints having been lodged against the company? A. That is my recollection of the matter.

Q. At any of these interviews between Senator Burton and yourself prior to the indictment, did he indicate to you that he would not undertake to appear in the Department as against the United States? A. He did.

Q. Are you able to recall on which occasion that occurred? A. Why, I cannot with any certainty. The senator told me that several times.

Q. Disclaimed, whenever the occasion arose, didn't

he, any purpose or intention to appear there against the United States ? A. I think he did ; yes, sir.

Q. Do you recall his having indicated that, so far from desiring to appear as against the United States, if an occasion arose when summary action was necessary, that he did not even ask to be notified with reference to it ? A. No, sir ; I cannot quite recall that. He did say, however, that he would not antagonize the department, no matter whether he thought they were right or wrong or not ; that even if he thought the position taken by the department were wrong, even then he would not oppose them.

Q. This wrapper shows that on the 8th of November, 1902, a complaint was filed by F. R. Fravel ; that fact was not called to the attention of Senator Burton, to your knowledge, was it ? A. I do not think so. If I might explain how the information was probably secured ?

Q. Yes, certainly. A. Instead of going down to the record myself, I probably asked my secretary to go and see whether there was a case, and get the names of the complainants, and he probably would simply take down those on whose complaints the case was made up.

Q. What I want to get at is the fact whether or not these complaints, other than those of the two Albany women, were called to the attention of the Senator ? A. My best judgment would be that they were not. I have no recollection of that.

Q. And that would cover the complaint of Arthur M. Allen, of January 5, 1903, and S. A. Warner, that is, the Pittsfield lady, of January 21, 1903 ; those are all that have been introduced here. That would cover all of those ? A. Yes, sir."

RE-DIRECT EXAMINATION BY COL. DYER :

Q. On this talk that you had with him, in which he said he would not antagonize the department, how many times was that repeated to you, that he would not antagonize the department ? A. You mean on how many different occasions ?

Q. Yes. A. Well, I should say possibly three times.

Q. I do not know that you answered fully in your first inquiry, on your direct examination, and I will ask the question now : What statements, if any, other than those you have already given, did he make in reference to Major Dennis, and the character of the man ? A. I cannot recall any particular statements

that he made with reference to him, except those in connection with Mr. Brooks.

Q. What did he say to you in reference to the character of Dennis, if anything? A. He said Dennis was all right, and was trying to do a straight business."

The testimony of Senator Burton is positive as to his movements prior to his coming to Washington, and is wholly uncontradicted, and excludes the hypothesis that he could have had any interview with Cochran before the 20th of November. Of course, it will be observed that Cochran is uncertain as to that fact, but Senator Burton's testimony makes it clear that Cochran must have been mistaken.

Senator Burton's testimony upon the head of this first interview is as follows (p. 216 of the Record):

"Q. How soon after that interview [with Harlan on the train, Nov. 17] did you reach Washington?

A. I reached Washington on the 19th day of November.

Q. When, before that, had you last been in Washington?

A. I left Washington on the 5th day of July, of that same year, and spoke in Topeka, Kansas, on the 7th; sailed for the Sandwich Islands on the 14th of August, returning and landing in San Francisco on the 6th of October; went into the campaign, and from the time I left Washington on the 5th of July, I was not back there any more until the 19th day of November.

Q. Now, you have heard the statement of Mr. Cochran, with reference to the earliest of your calls at his office. What was your recollection in regard to that? A. I called there first on the 20th day of November.

Q. Had you been there previously to that at any time between the time when you left Washington at the close of the session and the occasion of this visit that you indicate? A. I had not. I had not even been in the city.

Q. State what occurred—or, in the first place, for what purpose or for what purposes did you go to the Post Office Department on the 20th of November? A. I had received a letter from Mr. Harlan——

Q. Pardon me, is this the letter, the one of the 18th of November?

A. Yes, sir. That is—no, sir; this is not the original.

Q. The letter of which that is a copy? A. I take it that is a copy, without reading it all over.

Q. Here is the original? A. (Referring to paper.) Yes, that is the letter.

Q. Now, you had received that letter? A. Yes, sir.

Q. On receipt of it, what did you do? A. I went to Mr. Cochran's office.

Q. What inquiry did you make, as you recall? A. I asked him if he had any information—I cannot remember the exact words, but whether he knew if Mr. Dennis had been indicted, or if it had been determined to indict him, and said to him, 'If he is indicted I expect to help defend him.' And I think his answer was that he knew nothing about it.

Q. Now, in what connection was any information afforded you in regard to this so-called complaint of Mrs. Evans or Mrs. Hout? A. I cannot remember the exact words, or how we got at the subject, but to the best of my recollection I explained to Mr. Cochran that Mr. Dennis owned the Rialto Grain & Securities Company, and I asked him if there were any complaints—if he knew anything about that company—was my first question, and he said he did not know anything about the company; and I asked him if there were any complaints against the company.

Q. Right there, Senator, what was your purpose in making that inquiry of Cochran with reference to any complaints concerning the Rialto Grain and Securities Company; state to the jury what your purpose in that respect was? A. I had been employed as counsel for the company. Then I had this letter from Mr. Harlan (referring to the letter of Nov. 18) telling me that the tentative employment he had made with me had been ratified by the company. I had been advised that Maj. Dennis had had trouble with the Brook Brokerage company. As I say, I went there to ask about that. Both Mr. Kastor and Mr. Harlan had assured me that whatever irregularities there were in that company, it was not the fault of Maj. Dennis. I knew Judge Krum and Mr. Harlan were the attorneys of this company, but being advised that far, I wanted to satisfy myself with respect to the standing of this company in the department. That was the motive of the inquiry.

Q. In response to your inquiry about complaints, what did you receive from Mr. Cochran? A. Mr. Cochran was sitting, as I remember it, next to the window. His room is rather a long, narrow one. He got up and went across to the fore part of the room, if I recollect rightly, and looked at a record, and came back and said to me that there had been two complaints made or filed 'last month,' as I understood him, and that they had been sent out to the inspector in charge at St. Louis, and he gave me the names of Bella Evans and Mrs. Hout, of Albany, New York, and I made that little entry there at the time.

Q. At the time of the interview between Mr. Harlan and yourself, in which the details of your employment were arranged, was there any indication given you that there had been any complaint made against the Rialto Grain and Securities Company? A. No, sir, Mr. Harlan said to me that there was absolutely nothing against the company, and he said, 'if you do not believe it, go and inquire yourself.'

Q. So is it a fact that it was on this occasion that you first learned there was any such thing as a complaint against the company? A. Yes, sir.

Q. Did you see the Evans letter? A. No, sir, I did not, and I did not ask to see them.

Q. Was the interview between yourself and Mr. Cochran limited to this—or did anything further take place, as you recall? A. I had previously told Mr. Cochran, as I stated, that if Maj. Dennis was indicted in the other matter that I expected to help defend him, and then I said to him: 'Now, Cochran, I am the counsel for the Rialto Grain and Securities Company. Major Dennis owns the company. He is a stranger to me. I have been assured that the company is organized and its methods are all right. But I do not know, and if anything comes into the department that puts you upon inquiry, any complaints or anything of the kind, I wish you would advise me, because, notwithstanding I am counsel for the company, I am not its counsel here. I cannot be retained under any circumstances to appear in the department as a paid attorney.'

Q. Now, Senator, at that time did you— A. But there is one more expression I omitted there. I said 'Another thing, Mr. Cochran, in case that it should become necessary to recommend summary action on any complaint, disregard my request entirely; because I won't answer any of these complaints, and I won't

remain attorney of the company or counsel for the company if it has any trouble with the department.'

Q. On that occasion, Senator, did you, by any word you recall, or anything you did, indicate to Mr. Cochran any purpose on your part to interfere in any way with any of the processes of the Post Office department, or lead him—did you on that occasion attempt to lead him to withhold or abstain from any action that might be found necessary on his part, or on the part of any other officer in the department?

A. Not at all.

Q. Have you now substantially given us what occurred on this first occasion? A. Yes, as I remember it."

Record, page 219:

"Q. The letter of Mr. Harlan? A. Yes, the letter of Harlan. Going back a moment, Judge, and looking at this letter of November 20, I think there was some talk between Mr. Cochran and myself, I cannot remember the words, about the custom of hearings on complaints; that is, if complaints were made, unless it was a very aggravated case or required summary action, the parties were always notified and always heard.

Q. That was on the occasion of this first talk you had with him?

A. Yes, sir."

Record, page 220:

"Q. It appears from the evidence here, that even earlier than the 18th of November there had been filed a complaint, as it is called, of F. R. Fravel. Do you recall any information given to you with reference to any such complaint, on the occasion of your first visit? A. I never heard that there was any complaint against the Rialto Grain and Securities company until after I was indicted, except these two first that were mentioned to me on my first visit.

Q. That will cover the whole thing, Senator. When did you go, if at all, to the office.

A. I want to add, if you will allow me, that when I got Mr. Harlan's letter telling me those two cases had been examined and reported nothing in them, or substantially that, I never gave the matter another thought. And speaking in regard to these jackets, I

never heard of a jacket until Col. Dyer commenced speaking of it the other day, except once, and that is since I have been indicted, and when I was trying to find out in Washington if there were any other complaints against this company."

The foregoing testimony of Senator Burton is in substance and effect corroborated by Cochran and is totally uncontradicted in this case. No attempt was made to contradict or disprove it.

The foregoing testimony of Senator Burton if true is a complete defense, because it was through Cochran and Cochran only that Burton is charged with having committed the offense. Cochran was present as the Government's witness at the trial, and though present at the trial he was not called to rebut or contradict the testimony of Senator Burton above given, and nothing that Cochran said in his examination-in-chief contradicts it, but directly supports it. It appears on page 94 of the record that Senator Burton immediately upon and as a result of this interview wrote a letter to Harlan, which letter and its contents, having as it does sole reference to this interview, will be discussed in another part of this brief (p. 98). Suffice it to say here that this letter shows conclusively that the two complaints above adverted to of Hout and Evans were all that Burton heard of at that first interview (or any other prior to his indictment), and that he promptly advised Harlan with reference to it and indicated to him that they should receive immediate attention and that he had arranged that he should be notified if any further complaints were filed, and that the department would grant them a hearing. It appears further that these two complaints were, as Senator Burton testified, eliminated from his further thought and consideration by the reply promptly received to that letter, which is to be found on pages 175–6 of the record. For the convenience of the Court and as bearing strongly upon the main question involved in this prosecution, we quote this letter in full :

" Nov. 22, 1902.

HON. J. R. BURTON,
C/o Senate Chamber,
Washington, D. C.

MY DEAR SIR—We have your favor of recent date, [Nov. 20, p. 94] and contents noted. The claims that you referred to against the Rialto Grain & Securities Company, have been investigated by a Post Office Inspector connected with this Department, and he found the actions of our company to be all right, and, we are informed, made a report in favor of our Company relative to the same.

I now contemplate leaving here Monday night for Washington, and should, in due course, arrive there on Wednesday morning, and some time during Wednesday will take the liberty of calling upon you if convenient to you.

Everything is running very nicely here, but as I hope to see you within a few days, I will wait until then to explain some matters that have come up since my last communication.

I enclose the Company's check for $500, as per agreement. This check should have been sent in my former communication, but I neglected to do so.

Hoping that I shall have the pleasure of a personal interview at an early date, I remain,

Yours very truly,
THOS. B. HARLAN."

It might be further added that the testimony of Cochran (p. 148) and Burton (p. 220) both clearly and fully coincide in establishing the fact that these are the only two complaints that Burton ever heard of during the period of his employment and down to the date of the indictment. And it will be noted further in the letter just quoted that his mind, if he had any interest in them, which he disclaims, must have been absolutely set at rest by the information conveyed in the reply of Harlan to his letter.

This first visit of November 20 is not included in the indictment (which alleges no services by Burton prior to November 22), but if it were, the visit was lawful and proper, and does not prove or tend to prove the charge as alleged in the indictment, to wit, the render-

ing of services with a view to prevent the issue of a "fraud order." On the contrary it disproves so far as it goes any such charge.

B.

The second visit of Senator Burton to the Department, December 9, 1902.

Re Bowman and Shove, Bogus P. O. Inspectors.

This took place on the 9th of December, 1902, as testified to by Senator Burton (p. 219). Cochran cannot recollect the date, but the memory of Senator Burton in that behalf is nowhere disputed and the certainty of the date is fixed by correspondence and other circumstances in the case to which we shall presently advert. Respecting this visit, Cochran testifies (page 140 of the Record):

"Q. After "you gave him this information as to the complaints of Hout and Evans, when and where did you next see him, if at all, in reference to the matter of the Rialto Grain and Securities Company? A. I saw him again at the department, but I could not fix the date, only he made an inquiry whether certain persons [Bowman and Shove] who claimed to be inspectors were inspectors, and I gave him the information that the persons whose names he gave me were not inspectors.

Q. Do you recollect whether in that inquiry a man by the name of Bowman was mentioned as one? A. I could not recollect that, from my own recollection.

Q. What was his inquiry and what did he say in reference to the matter, at the time he made this inquiry? A. Well, he wanted to know if such persons were inspectors and if they were investigating this case.

Q. Was that substantially *all* that occurred? A. I think so, yes, sir."

Senator Burton's testimony upon this visit is as follows (p. 219):

"Q. When, Senator, did you go to the Post Office department the second time? A. Well, with reference to what, Judge?

Q. I mean with reference to any of these matters that have been inquired of here? A. I do not remember the date.

Q. Is there anything in any of these letters that will assist you in that direction? A. I have no independent recollection of the date, but the letter is on the 9th of December.

Q. It was of course before the 9th of December, the letter having been written on that date, that you went there? A. Yes, sir.

Q. To which office did you go? A. I went to Mr. Cochran's office, and my recollection is, showed him that letter of, I think it is December 3rd (Record, p. 137).

Q. The letter of Mr. Harlan? A. Yes, sir, the letter of Mr. Harlan."

* * * * * *

Q. Now, with reference to that letter of the 9th of December (p. 136), about when was it you went to the office of Mr. Cochran?

A. Well, I can only give my best recollection that it was on the 9th.

Q. With reference to what did you go there then? A. Hand me that bunch of letters, or give me the letter of Dec. 3rd.

Q. This is the one, signed by Harlan? A. Yes. When I received this letter, the next time I was at the office, in making the rounds of departmental calls some weeks afterwards, I suppose it was, my recollection is that I showed Mr. Cochran this letter, and I did it for the purpose of advising him with reference to this man whom Harlan thought was a fraud or the men. Mr. Cochran said at once 'there is no such inspector as Bowman;' that he would like to catch him, and spoke about the other man being a fraud, and I think he then said, 'There is nothing in this office here against this company in any shape, manner, or form, or no instructions gone out,' or something, I don't remember. I could only infer from my letter.

Q. Your best recollection, then, is that this call at the office of Cochran was on the 9th of December? A. That is my recollection.

Q. Did you have any other purpose in going there, or did you indicate to him any other purpose on your part in going there than to inquire with reference to two persons named in this letter? A. Nothing at all. And if there is any other statement made, it was volunteered, that was the purpose of my inquiry, and I was there for a moment. I remember very well being there, but, as I say, I cannot say positively it was the ninth."

Cochran was not recalled by the Government on this subject, and the foregoing is *all* the testimony as to this second visit.

It appears, therefore, from this testimony, which is uncontradicted, that this second visit was occasioned alone by the letter of Harlan to Senator Burton of date December 3, 1902, found on pages 137-8 of the record relating to two bogus Post-office Inspectors named Bowman and Shove. The substance of this letter was to the effect that certain individuals, Bowman and Shove, were claiming to be Post-office Inspectors, and were annoying and demanding inspection of the affairs of the Rialto Grain and Securities Company, and that Harlan was of opinion that they were fraudulently representing themselves to be United States officers, and the visit of Senator Burton to the department was solely to determine this question. Burton's answer to this letter, dated December 9th, is on page 136 of the record, and conveys the information that he obtained from Cochran upon this subject. The other matters contained in the letter, and the general purport of the letter and its relationship to the inquiry before the Court will be discussed in another part of this brief *(post,* p. 104).

The purpose of this visit was lawful and proper and the defendant said or did nothing proving or tending to prove the charge alleged in the indictment, to wit, to prevent the issue of a "fraud order." On the contrary, it negatives so far as it goes any such charge.

C.

The third visit of Senator Burton to the department, December 15, 1902.

CASUAL CALL *re* DENNIS INDICTMENT.

By reference to page 140 of the record it will be seen that there was a little confusion in the mind of Cochran in his testimony as to what was the occasion of the third visit of Senator Burton, but he is straightened out by his counsel on page 141, and Cochran testifies as to that third visit as follows:

"Q. May I refresh you a little on that, probably, by asking you this question: Did you see him at the department in company with Maj. Dennis in December before? A. Yes, sir, I did.

Q. Now, you may state, have you any definite recollection as to the date of that visit? A. Only the nearest approach I could make to the date was that it was after the indictment and the arrest of the officers of the Rialto Grain and Securities Company.

Judge KRUM: Q. You mean of the Brooks Brokerage Company?

COL. DYER: Q. Including Maj. Dennis? A. Yes, sir.

Q. Will you state to the jury what he said to you at that time and upon that occasion? A. Well, he said first that he wanted me to see Maj. Dennis and see what kind of looking man he was, and he repeated the assurance that his company was endeavoring to do a straight business, and also the former statement that all the troubles arose from the conduct of the Brooks Brokerage and Commission Company.

Q. Was that the first time you ever had seen Maj. Dennis?

A. Yes, sir.

Q. Were you introduced to him by the Senator? A. I was.

Q. Now, what else was said in that interview, if anything?

A. I do not recall anything, except the general statement that they did not wish to antagonize the department, and that they wanted to do just exactly as the department wanted them to do.

Q. In what respect, did they say? A. In the conduct of the business of the company.

Q. Was there anything said in reference to conforming to the rules of the department as to the kind of literature that should be sent out through the mails at that time? A. No, sir, I do not recall any such statement."

Cochran, on cross-examination (p. 148), testifies he "cannot recall any particular statements that he [Burton] made with reference to him [Dennis] except those in connection with Mr. Brooks" the visit related to the Brooks matter.

The indictment referred to in this testimony was the indictment that was feared by Dennis and the Rialto people at the time of Burton's employment. The Brooks Brokerage Company had been purchased and taken over by Dennis and the new company, the Rialto Grain and Securities Company formed. The indictment in question had no relation to the Rialto Grain and Securities Company (pp. 204–209) but was wholly confined to the operation of the Brooks Brokerage Company and Major Dennis was involved in this indictment solely by reason of his purchase of the business of that company, and as it afterwards appears by this record was tried and acquitted of any offense by reason of the fact that he had no relation whatever to the matters charged in the indictment (Verdict, p. 210.)

Senator Burton's testimony with reference to this third interview is to be found on page 220 and is as follows:

"Q. When after the 9th of December, did you go to the office of the chief inspector? A. I called there with Maj. Dennis on the 15th day of December.

Q. What was your purpose in going there at that time? A. Maj. Dennis had come on to Washington and brought a copy of his indictment, and a statement of the facts, or purported facts, prepared by yourself and Mr. Harlan. I had spent the evening with him before, and the forenoon of the 15th, and had given him my opinion respecting the case, upon the facts stated. We took a carriage and drove to my office from the New Willard hotel. Maj. Dennis was urging me, after

I gave him the opinion, to come back to St. Louis with him. I tried to dissuade him; that it was not necessary—shall I tell what was said there?

Q. No, it is not necessary to go into that at all. A. After we got there Maj. Dennis wanted to make a draft—

COL. DYER: I don't know what we have to do with all those particulars.

JUDGE KRUM: Q. Come to the interview in the office.

A. We were driving by the office and I suggested that we make a call on the 4th Assistant Post Master General merely to pay our respects.

Q. Did you go to his office? A. We went to his office; he was not in; we waited a few minutes and then we left his office and went down the winding stairway there. I suggested that we go down that way and make a call at Mr. Cochran's office.

Q. What occurred at Mr. Cochran's office? A. I think it is about as he told it.

Q. You introduced Maj. Dennis to him? A. Yes, I introduced Dennis and I heard some talk there about Dennis' middle name being Cochran, and they talked about family matters.

Q. Your recollection of what occurred is substantially as Mr. Cochran indicated? A. Well, sir, I don't remember anything different, unless it was, unless I said something about being Maj. Dennis' attorney.

Q. Unless it is materially different, it is not necessary. A. As he gave it, it is substantially correct.

Q. On that occasion, Senator, did you ever have any other purpose in going to Mr. Cochran's office than to merely present Maj. Dennis? A. No, sir, we were driving back from my office to the bank."

The purpose of this visit was lawful and the defendant said or did nothing tending to prove the charge alleged in the indictment, to wit, to prevent the issue of a "fraud order." In fact, Burton had no knowledge that any complaint against the Rialto Company was before the Department for its action or decision. (On this point of want of such knowledge see *infra*, p. 84.)

D.

The fourth visit of Senator Burton to the Department, January 24, 1903.

RE THE BOOKS, OF THE BROOKS BROKERAGE COMPANY.

Before the fourth visit of the Senator to the Department the indictment against Dennis had been tried in the Federal Court at St. Louis and he had been acquitted on January 20, 1903 (p. 210). In that case Dennis had voluntarily offered to produce and did produce for the use of the government the books of the Brooks Brokerage Company. These books, however, were the property of Dennis, because he had purchased the business of the Brooks Brokerage Company and he was entitled to them for his protection against Brooks and for such legitimate uses as he might have for them, provided the government was through with them. The inspector in charge, Mr. Dice, was at that time threatening to turn these books over to the *State* authorities. Of course it was claimed by Dennis and admitted by the Department that Mr. Dice had no right to do this, but that it was Dice's duty when through with them to turn them over to the owner [Major Dennis], although the evidence shows that Major Dennis was ready and willing to allow the government to retain them for any future use that it might have for them.

Respecting this visit, Cochran testifies (p. 141 of the Record) as follows:

"Q. When after that did you see him [Burton] next? A. About the 24th of January, 1903.

Q. State where you saw him then? A. At my office in the department.

Q. What occurred at that time, and what was said? A. He stated that Mr. Dice had taken a book or the record that had been turned over to him in the investigation of the case in the United States Court, and that after that case had been thrown out, he was taking

them over to the State courts for use here. And he said that those records had been surrendered voluntarily and it was a breach of faith on the part of Mr. Dice to make that use of them. And he asked that Mr. Dice be ordered to return the books.

Q. What was said by you and him any further? A. I told him that Mr. Harlan who was the person who wanted the books back should see the United States attorney and Mr. Dice would be governed entirely by whatever instructions he might give. But the Senator insisted that something ought to be done about the matter, and at my suggestion we went to see the 4th Assistant Post Master General, and the case was stated to him.

Q. State what occurred between the 4th Assistant Post Master General and Mr. Burton and yourself on that occasion when you got there? A. There was practically the same statement that was made to me and the same request; that Mr. Dice be ordered to return the books.

Judge Krum: Q. These were the books of the Brooks Brokerage and Commission Company, weren't they? A. I think so. Of course, I never saw them. But it was a book that had been surrendered to Mr. Dice, in the investigation that he made.

Judge Krum: That is a fact, isn't it, Col. Dyer, that it was a book of the Brooks Brokerage Company?

Col. Dyer: That is true.

Q. What was further said by the 4th Assistant Post Master General? A. The 4th Assistant Post Master General also declined to say that the order would be given. Then, my recollection is, we all three went to the Post Master General, and the case was submitted to him. The Post Master General, after considering the matter, directed me to send a telegram to Mr. Dice.

Q. After the conversation had with Senator Burton and yourself and the 4th Assistant Post Master General? A. Yes, sir.

Q. I show you a message and ask you whether that is the message that was sent to Mr. Dice after your visit to the Post Master General in company with Senator Burton? A. (After examining the paper.) It is.

Q. That is the dispatch you sent? A. Yes, sir, it is.

Q. According to the direction of the Post Master General after the visit and the conversation had there

in reference to this matter, between the 4th Assistant Post Master General, yourself, the Post Master General and Senator Burton? A. Yes, sir.

Q. This dispatch seems to have your name as the inspector; by whom was this dictated? A. By the Post Master General.

COL. DYER: I offer to read that dispatch.

JUDGE KRUM: It is obvious, your honor, that this telegram does not relate to any matter involved here, and accordingly we object to it.

COL. DYER: This shows, as has already been shown in the course of this trial and by these papers, that this matter of the trial of Dennis, was over long before this dispatch was sent, and it is offered for the purpose of showing the continuous relations that existed between this defendant and Dennis, who was the president of the Rialto Grain and Securities Company.

JUDGE KRUM: There is no dispute at all about that, but we submit that whatever occurred—Now, Mr. Cochran has explained what occurred in reference to these books. Your Honor has observed from the testimony they were the books of the Brooks Brokerage Company. What was contained in those books did not concern the Rialto Grain and Securities Company at all. The books were used in evidence here before your Honor, as your Honor recalls, and after the trial of Garland and Dennis, there was no further occasion for the further retention of those books by any of the officers of the Government, and this testimony merely goes to show that Mr. Burton, acting for the Rialto Company, if you please, as he undoubtedly did, sought to have those books returned to Maj. Dennis. Now, there was nothing done by the defendant in that regard which would involve any culpability with reference to the charge upon which the defendant is now on trial.

Objection sustained."

[NOTE: By the same reason, *all* this evidence was, like that telegram, utterly immaterial, and failed to prove or to tend to prove the charge in the indictment.]

Senator Burton testifies in regard to this matter on page 221 of the record as follows:

"Q. That was your purpose in going. Then when did you next go to the office? A. I think it was on the occasion of January 24. Let me see those

telegrams and I can tell you (referring to telegrams.) No, I haven't any. It was the occasion that he testified about when I went with reference to the records and books of the Brooks Brokerage Company.

Q. Was that all that was referred to or discussed on that occasion? A. Yes, sir, that was all. There was nothing else talked about.

Q. Was your purpose in going there limited to an inquiry or action in regard to the Brooks Brokerage Company? A. Entirely so, yes, sir."

This testimony was irrelevant, and ought to have been excluded from the jury. It was wholly foreign to the alleged offense. The visit was lawful and proper. What Burton said did not prove, or even tend to prove, the charges of the indictment, to wit, to prevent the issue of a "fraud order."

E.

The Fifth and last interview with Cochran at Senator Burton's office, February 5, 1903.

ALSO RE THE BOOKS OF THE BROOKS BROKERAGE COMPANY.

The purpose of the last interview of Senator Burton with Cochran, on February 5, 1903, was the same as that of the fourth interview; namely, with reference to the books of the Brooks Brokerage Company retained by Dice, and was occasioned by a telegram of that date, February 5, 1903, from Harlan to Burton, to the effect that Dice had carried out his threat and had actually turned over the books to the State authorities (p. 222). This telegram (p. 222 text) is quoted and referred to in this brief, *(infra*, p. 106).

Cochran's testimony with regard to this interview is as follows (p. 143 of the Record):

"COL. DYER: Q. When, after that visit to the Post-Master General, did you next see Senator Burton? A. On the evening of the 5th of February, 1903.

Q. Where did you see him? A. At his office in the Senate Annex, in the Maltby Building.

Q. How did you come to meet the Senator there? A. The Senator's secretary, Col. Smith, telephoned me in the course of the afternoon, saying that the Senator would like to see me, and asked if I would not call at his office on my way home. The Maltby Building is about half way between the Department and my house, and I did call on him.

Q. Will you state, as nearly as you can, all that was said on that occasion in reference to the Rialto Grain and Securities Company? A. The Senator either showed or read me a telegram from Mr. Harlan, stating that they had not got possession of this book or books, and that Col. Dyer had stated he had no further use for them, and the Senator again said that if that was the case they ought to be returned, that Mr. Dice was acting in bad faith in insisting upon keeping the books. I promised to send a telegram of inquiry the next morning, and I did send one.

Q. What else occurred in that interview? A. After that matter was settled, the Senator said to me, 'Cochran, I want to appear in this and other cases before the Department, but I want it understood that in so doing I shall never antagonize the Department, and my efforts shall rather be used the other way.' He said he could make some money in that way and apply it on old debts. That he had lost very heavily during the panic and that he had paid in—I cannot tell exactly in what time, but my recollection is during his time as Senator—$70,000 on which he was not legally liable, but that if there was any just claim against him he would never plead the statute as a defense.

Q. What else was said there in that conversation? A. He said there was not anything wrong about this. That a number of senators, notably Senator Edmunds, had very materially increased his income by such practice and that it was all right.

Q. Was that substantially all that took place there at that time? A. Nearly all, I think so.

Q. What, if anything, was said by him in that conversation with you, that when he overstepped the

bounds, what was to be done? A. He asked me to warn him.

Q. What case, or cases, did he say he would like to represent before the Department? A. Well, he said in this and other cases. The case we had been discussing was that of the Rialto Grain and Securities Company, as I understood it.

Q. Did he mention any other case in which he would like to appear? A. No, sir.

Q. After that time, did you have any further meeting or conversation with him in reference to the Rialto Grain and Securities Company? A. I do not recall any other until after the indictment was returned against the Senator."

On page 145 of the record, on cross-examination, he testified further as follows:

"By Judge Krum:

Q. This last interview before the indictment was, as I understand you, in February? A. February, 1903.

Q. And on what date in February? A. The 5th.

Q. That was the first time, wasn't it, that Senator Burton made the inquiry of you of the description you have given here? That is, the first time that the subject of his representing or appearing for the Rialto Grain and Securities Company was mentioned? A. Yes, sir.

Q. And that was the only time, was it? A. Yes, sir, the only time—well, except the last.

Q. I mean before the indictment? A. Yes, sir."

Senator Burton's version of this interview is to be found beginning on page 221 of the record and is as follows:

"Q. Now, when did you go to the office of Cochran again? A. With reference to the Rialto Grain and Securities Company? Or any matter connected with it?

Q. Yes. A. I don't think—I do not now recall that I was ever there again, although I would not be positive about that, Judge. I have tried to think of these matters as carefully as I could, but departmental calls are so many and varied that it is very hard to do it.

Q. On the occasion of the 5th of February, where did that interview take place? A. At my office—if you will give me those letters and telegrams, I can tell

you. (Referring to papers.) I received this telegram; I do not remember whether it is in evidence or not.

JUDGE KRUM: In connection with the Senator's testimony, I will read the telegram, dated St. Louis, Feb. 5, 1903, addressed to J. R. Burton. Which telegram is in words and figures as follows, to wit: (Counsel reads:)

"FEB. 5, 1903, ST. LOUIS, MO.

TO THE HONORABLE J. R. BURTON,
Senate Annex, Washington, D. C.

Dice delivered our books to state authorities, where they are held subject to his order. Get order requiring him to deliver to us. Col. Dyer told me he had no further use for them." [Signed by Harlan, p. 143.]

Q. Now, to what books did that telegram refer? A. To the same books and records.

Q. Do you mean the books of the Brooks Brokerage Company? A. Yes, sir. They were books that I had been advised had been voluntarily turned over to the authorities in the trial of Maj. Dennis.

Q. How did Mr. Cochran happen to visit your office, Senator? A. Just as he detailed. I asked Col. Smith, my secretary, to invite him there, and whether he 'phoned or went I do not remember.

Q. With reference to that interview, has Mr. Cochran substantially stated all that occurred? A. Well, he stated something of it, but he didn't state it substantially. I think he was very much mistaken in one part of it.

Q. With reference to that part, what part was it? A. I showed him this telegram, and he expressed surprise at that part of it which said, 'Col. Dyer told me he had no further use for them,' and said he would look into the matter at once. I told him that I knew nothing about the matter further than he did, but that, if Mr. Dice or Col. Dyer or the Government, or anybody connected with the Government, wanted to keep these books, there was no objection, as far as I knew, and, if there was, I would not urge any objection. But, unless he could give me some reason why they should be turned over to the State authorities, it would seem that that was not fair and right. He said he would look into it. We then branched off to something of a personal talk, as I remember. Mr. Cochran is from my

State, and I knew that he knew my history. I talked to him about being counsel for this company. I cannot remember just what I said, but reiterated what I had said to him in the first instance—I am a little ahead there. I told him the employment had come to me, and I was very glad to get it—

Q. He went over those matters, Senator, and I do not think it is necessary for you to do so. A. I want to call especial attention to one part of the conversation.

Q. I was going to call your attention to that myself. As I recall it, Cochran stated you made some remark about a desire to practice in the department, or to establish a practice in the department. I will get you to indicate to the jury whether that is the remark you made, or, if it is not, what you did say. A. Oh, no.

Q. There is no occasion to consume time with much detail about it, but just let the jury understand generally what your recollection about that is. A. I called attention to the fact that men like Senators Edmunds and Conkling had built up a good practice while they were senators, in the courts and as counsel—and, in a small way, I wanted to imitate them—because he knew my financial condition; that in the panic, and the long years after that had followed, I had lost my fortune; and I said, 'Now, Cochran, I am counsel for the company—for a company that had to do with the mails—and I want you to be particular and advise me if you see at any time any wrongdoing on the part of that company. Notwithstanding I am not the conservator of the morals of my client, I cannot afford and will not be their counsel if they have any trouble with the department.

Q. The important part is your seeking to establish a practice in the department. Did you ever, at any time, undertake anything of that kind? A. Not for one moment, at any time since I have been senator."

This visit has no relation to any fraud order—not the slightest. The testimony ought to have been excluded from the jury.

The purpose of this visit was lawful and proper, and the defendant did or said or sought nothing in respect of the issue of a fraud order, as alleged in the indictment.

The Inconsequential Supplemental Talk.

The supplemental talk narrated by Cochran at this fifth and last interview is the only hint or suggestion to be found in the entire body of this proof that Senator Burton ever had entertained, directly or remotely, a purpose to appear before the department in this or any other case for which he received compensation as counsel.

Relative to this personal talk between Burton and Cochran on this occasion after the business for which the meeting had been made "had been settled," it should be borne in mind, first, Burton up to that time never heard of any complaints that had been filed against the Rialto Grain and Securities Company, except the two of Hout and Evans. As long back as November 22, in the letter from Harlan, he had been notified that those complaints had been investigated by an inspector, who had reported there was nothing in them. On December 9th, Burton was told at the Post-office Department that "there is nothing in this office against you [that is, the Rialto Company] at this time" (Record, page 136). And Burton knew of nothing (page 220). And Cochran admits on his cross-examination (page 148, top) that "no complaints other than those of the two Albany women [Hout and Evans] were ever called to the attention of the Senator." Therefore, there was absolutely nothing pending in the department, so far as Burton knew, against the Rialto Grain and Securities Company, requiring any service or any attendance or any appearance of any kind or character upon his part before the department. Is it not plain, then, that Cochran's version of this conversation is wrong and that Burton's version is right? He was the general counsel of the Company; it did have to do with the mails. He would not look to an inspector to advise him respecting the ethics of his profession, but he would look to an inspector, a man from his own State,

to advise him if complaints were filed against that Company, or if he saw any evidences that the Company was violating the rules of the department in any shape, manner or form; in which event, he would sever his connection with the Company if it had any trouble with the department.

But even if it be assumed that Cochran was not mistaken and that Senator Burton said exactly what Cochran states, to wit (Record, page 143): "I want to appear in this and other cases before the Department, but I want it understood that in so doing I shall never antagonize the Department and my efforts shall rather be used the other way"; the question arises what is meant by the words "in this and other cases before the Department." Obviously these words refer to the "case" with which Senator Burton was then dealing, namely, the effort to get back the books of the Brooks Brokerage Company. That was the matter which was then under consideration, and the *only* matter, and it was perfectly proper and lawful for Senator Burton to appear in that matter, it being one in which the United States was not directly or indirectly interested in any way whatsoever. Bear in mind in this connection that, so far as Senator Burton knew, the only matters which had come before the Department were the Hout and Evans complaints, and that he had been advised expressly that these complaints had been disposed of; and bear in mind further that Senator Burton, on Cochran's own testimony (Record, page 148), knew nothing whatsoever of any other complaints (Record, pages 147, 148) (see Burton's Testimony, page 220, to the same effect). Senator Burton knew nothing whatsoever about any alleged "case" pending before the Department, which was made up of the various complaints which Cochran testified were put into a jacket and dignified by the name of "case," etc.; all this Senator Burton knew nothing about until after the indictment.

Bearing all this in mind, it will be seen that even if Cochran's testimony is to be given full credence, and

Burton's testimony disregarded, it means only that Burton says, "I want to appear in this (the Brooks Brokerage books case) and other cases before the Department." That is neither any offense charged in the indictment, nor any other offense under the laws of the United States. And even if it referred to any case in which the United States had an interest, it is only the expression of a desire and is not any admission of anything, and is not any admission that he *had rendered* any services prohibited by Section 1782, or otherwise. The fact that Senator Burton mentioned the name of Senator Edmunds (as Cochran testifies), or that he mentioned the names of both Edmunds and Conkling (as Senator Burton testifies he did), shows that Burton had no idea of doing anything except following their example, and had no idea of rendering any improper services, and in all probability whatever was said on that subject related to general law practice, such as Senator Edmunds and Senator Conkling engaged in in addition to their duties as Senators.

This talk is we repeat no "service," and no offense and no admission of any offense, but the reverse, and is wholly immaterial as to anything charged in the indictment.

Moreover, it must be borne in mind in determining the question of Burton's relationship to the department with reference to these two so-called pending complaints that so far as the evidence shows nothing ever came of them; they were dropped, obliterated, after the 14th day of November, 1902, and before Burton's employment—at least up to long after he ceased his connection with the Company, and that no effort was then made, or has since been made, so far as Burton knows or so far as this record discloses, to proceed in the department against the Rialto Grain and Securities Company or to base a fraud order upon them.

We need hardly suggest to the Court that the statements of Mr. Cochran in this interview as to the desire and purpose of Mr. Burton would even, if true, not be

competent testimony in this case. He is being tried for his acts, for what he did, and not for what he said he would like to do. And this is not left to conjecture. The concluding statement of Senator Burton in his examination in chief, appearing upon page 223 of the record, is, so far as this record goes, the truth and nothing but the truth, and is wholly uncontradicted, and we herewith append it. In answer to a question of his counsel, he testifies as follows:

"Q. I will get you to indicate to the jury whether, at any time, either to Mr. Cochran, as chief inspector, of the Post-Office Department to the Postmaster General, to the 4th Assistant Postmaster General, or to the Assistant Attorney General for the Post-Office Department, you ever said anything or ever did anything in the presence of either of them, or indicate a purpose on your part, to influence them at all with reference to any proposed action in regard to the Rialto Grain and Securities Company in that department? A. Absolutely none whatever—and I do not think any officer of the Government would say so."

And none has said so.

Certainly, the only witness whom they had produced has not only not said so, but has in answer to questions propounded by the prosecuting attorney and by Burton's counsel, again and again reiterated that Burton did not seek to and did not influence him.

The foregoing is the testimony in full relating to every visit of Burton to the Department. It shows affirmatively that the charge that Burton tried to prevent the issue of a fraud order is not true.

There is a total absence of any testimony even tending to show that anything Burton said or did either directly or indirectly had or was intended to have the smallest influence upon the action of any officer of the Post-Office Department with reference to any matter or

thing pending before the department in relation to the issue of a fraud order as alleged in the indictment. On the contrary the testimony disproves the truth of the charge made in the indictment. Thus, Government witness Cochran expressly testifies (Record, pp. 146, 147,) as follows:

"Q. At any time from the beginning of Senator Burton's indication to you that he had any connection with the Rialto Grain and Securities Company, there was no discussion between you and him [Burton], **was there, as to the issuance or non-issuance of a fraud order as it is called, against the Company? A. I think not.**

* * * * * *

"Q. I understand you, then, that you are not able to recall any occasion upon which the Senator made any representation to you or had any conversation with you with reference to the issuance of a fraud order? A. No, sir.

* * * * * *

"Q. There was no discussion between you was there, on this occasion, of the merits of the representations of Mrs. Evans or Mrs. Hout? A. No, sir.

* * * * * *

"Q. It is a fact, isn't it, as you recall, this occasion when senator was advised of these two complaints, was the only one upon which he was advised of any complaints having been lodged against the company? A. That is my recollection of the matter."

CERTAIN LETTERS AND TELEGRAMS were introduced by the Government and relied on in the trial to establish the charge laid in the indictment that Senator Burton rendered services in the P. O. Department to prevent the issue of a fraud order against the Rialto Company.

As demonstrating the truth of Cochran's statements just above quoted that Senator Burton never "made any representation or had any conversation or discus-

sion as to the issuance or non-issuance of a fraud order," and of Burton's testimony to the same effect (p. 223), and as showing that the Letters and Telegrams had no reference to a fraud order and related entirely to other matters wholly distinct from any fraud order inquiry, we proceed to show that the *defendant did not even know that any fraud order inquiry was "before" the Department or "pending" therein.*

After showing this we shall then refer to the letters and telegrams *seriatim* to show that they contain nothing to support the charge in the indictment.

The Defendant, During the Time of His Employment by the Rialto Grain and Securities Company, Did Not Even Know That Any Inquiry Was Before the Department, or Pending Therein, as to Whether the Postmaster General Should Issue a Fraud Order Against the Said Company, and He Never Rendered Any Service Having Any Reference Whatever to the Issuance of a Fraud Order.

That Senator Burton's services had nothing to do with any question of the issuance of a "fraud order" against the Rialto Grain and Securities Company is clearly shown by the chronology of the matter. The testimony of Cochran (Record, pp. 147, 148), as well as the testimony of Burton (Record, p. 220), was to the effect that the only complaints made in the Post-office Department against the Rialto Grain and Securities Company, of which Burton was informed or of which he had any knowledge, notice or information whatsoever at any time before his indictment, were the complaints of Hout and Evans.

Not until November 17, 1902 (Harlan's Testimony, Record, page 170), did the conference take place be-

tween Harlan and Burton on the train from St. Louis to Chicago, when the agreement was made for Burton's employment. The complaints of Hout and Evans were received in the Post-office Department at Washington on October 31, 1902, and November 1, 1902, respectively (Record, page 57). November 7, 1902, these complaints were referred to the Post-office Inspector in charge at St. Louis (Record, pages 64 and 65). Inspector Dice, the Post-office Inspector in charge of the St. Louis Division, testified (Record, page 69) that these complaints were received in his office November 10, 1902, and that on November 14, 1902, they were referred to local Post-office Inspector M. G. Price for investigation. Dice also testified (Record, page 70) that within a day or two afterwards Inspector Price made an oral report to him to the effect that "*the two complaints were not of such a character as to warrant action in the matter of the recommendation of a fraud order.*" Inspector Price testified (Record, page 202) that the complaints were turned over to him on November 14, and that he made inquiry and investigated the records of the Rialto Grain and Securities Company *that same day*, and that he returned the case to the office, and (page 203) that the investigation of the records satisfied *him that the complaints were not warranted.*

The facts were, therefore, that these complaints of Hout and Evans had been made in the Post-Office Department, had been investigated by that department, and a report had been made that there was nothing in them to warrant the issuance of a fraud order, and there the matter stood *before* Senator Burton was employed by the Rialto Grain and Securities Company. These complaints of Hout and Evans were not mentioned when Burton was employed (pp. 189, 220). They were the only complaints that Senator Burton ever knew of (Record, page 147, 148, 220). Burton's letter of November 20 (p. 94) shows that until that time he did not know of the Hout and Evans letters. And see Harlan's letter of

November 22 (p. 175). Also Burton's letter of December 9 (p. 136), and Cochran's evidence (pp. 146, 147, 148).

Furthermore, Cochran testified (Record, page 146) that he was

"*not able to recall any occasion upon which the Senator made any representation to him or had any conversation with him with reference to the issuance of a fraud order*" (Record, p. 146).

Burton had no conversation, conferences, or intercourse with any other officer of the Post Office Department except Cochran as to any matter charged in the indictment. Bear in mind that the allegation of the indictment is that the matter or thing which was pending before the Post-Office Department was whether (Record, page 5)

"the Postmaster General should order and direct the Postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain and Securities Company, but to return with the word 'Fraudulent' plainly written or stamped upon the outside (as authorized by Section 3929 and Section 4041 of the Revised Statutes of the United States, as amended by the Act of Congress of March 2, 1895) any and all letters addressed to said Rialto Grain and Securities Company, and sent to or through the post-office at St. Louis, Missouri, by means of the Post-office establish- of the United States."

It is also alleged that (page 5) the services rendered by Senator Burton were

"with a view and for the purpose of inducing said Postmaster-General, the said Chief Post Office Inspector, and said other officers, to decide the question so as aforesaid pending before said Post Office Department in a manner favorable to the said Rialto Grain and Securities Company."

Bear in mind, also, that the testimony of Inspector Cochran, with whom alone Senator Burton had the conferences or conversations in the Post-office Depart-

ment, was to the effect that there was *never any reference in the said conversations to the issuance of a fraud order* (Record, p. 146); and bear in mind, also, that before Senator Burton's employment the only complaints of which Senator Burton ever heard prior to his indictment, had *already been disposed of* as above shown; and it will readily be seen that there is absolutely nothing whatever in the evidence to support the allegations of the indictment that Senator Burton rendered any services whatever to the Rialto Grain and Securities Company before the Post-office Department in respect of the issuance of a fraud order against the Rialto Grain and Securities Company.

Moreover the alleged services all related to something else than the issue of a fraud order.

No "case" against the Rialto Grain & Securities Company was pending before the Post-Office Department. If any complaint was pending there against that company, Burton did not even know of it, much less appear there for the company.

In the testimony of Inspector Cochran (Record, page 73 *et seq.*, also page 139 *et seq.*) there is a great deal of talk by him and by Col. Dyer, the prosecuting attorney, about a "case" being made up by the Post-Office Department when the letters of Hout and Evans were received, and they speak about a "case" pending before the Post-Office Department, etc. An examination of the testimony shows that what they meant is that when somebody, as for example, Hout and Evans, writes a letter to the Post-Office Department, that then in order to keep their files straight, they put this letter in an envelope or box, which they call a "jacket," and that for convenience they call the matter a "case."

It goes without saying that this custom of the Post-Office Department in the keeping of its files cannot change the true nature of any matter which is before the Department. Stripped of all this artificial talk about "case" and "case pending," "jacket," etc., the facts as to what was done were these: When these letters of Hout and Evans came before the Post-Office Department they were sent by the Post-Office Department to St. Louis for investigation by Inspector Dice, the inspector in charge there, and he delegated Inspector Price, one of the inspectors under him, to investigate the matter and report to him. Price did investigate the matter and reported to him November 14, 1902, that there was nothing in the charge, and there the entire matter of the complaints of Evans and Hout, so far as the evidence in this record shows, ended.

Post-office Inspector Dice says (Record, p. 70): "They [the Hout and Evans complaints] may have been taken up in connection with a number of other complaints at the time of the investigation by Mr. Price and Mr. Piatt. That was in July and August, 1903."

Mark, the witness does not say they *were* taken up, but may have been. This was eight and one-half months after Burton's original employment, and four months after his employment by the Rialto Company had terminated, and four months and a half after the dates at which the indictment alleged Burton performed any services before the department. Neither Dice nor any other witness actually states that they were taken up again or that any investigation was had respecting them after the investigation made in November, 1902, and the report made November 14, 1902, that there was nothing in these two complaints. Without reflecting on Mr. Dice, it fully appears in this evidence that he was not partial to Major Dennis. Dice was the agent of the Post-office eDepartment and was aiding the Post-office Department in the prosecution of Dennis for his alleged connection with the Brooks Brokerage Com-

pany. After that prosecution was ended and Dennis acquitted, and when Dennis was clearly entitled to the books of the Brooks Brokerage Company and asked Dice to return them, Dice persistently refused to do so, but on the contrary turned the books over to the *State* authorities, and this at a time when the United States Government and the District Attorney said they were through with the books. Dice was informed of the report of November 14 in favor of the Rialto Company. The company was doing business in the same city where Dice resided. He knew that fact, and if he had not accepted the investigation and report of November 14 as satisfactory to him and as making an end of the matter he would have ordered a further investigation or further action in the matter.

The conclusion, then, is irresistible respecting the Hout and Evans complaints, that after Dice received the favorable report from Price on November 14, that he, Dice, considered that report satisfactory and that the matter was at an end.

It, therefore, appears from the facts and circumstances in this case not only that Senator Burton was informed and believed that the only two complaints of which he ever had any knowledge, Hout and Evans, had been investigated and disposed of before his employment, but that the officers of the Post Office Department had the same understanding.

This whole prosecution is based upon the fiction that the Hout and Evans complaints, thus disposed of, and understood to be disposed of on November 14, before Burton's employment, was nevertheless a matter pending in the department for its action during the whole period covered by Burton's employment, namely, from November 18, 1902, to March 26, 1903. There was no such inquiry pending, and, as we have shown, the subject matter of said fraud inquiry was never mentioned, as Mr. Cochran expressly testifies, by Senator Burton at any time during Senator Burton's employment. For it must be borne in mind that Burton's entire relation

to this matter is as if no other complaints had been made except the Hout and Evans.

The complaints of Evans and Hout were the only complaints before the Post-Office Department, with which the evidence at all connects Senator Burton (Cochran's Testimony, Record, pp. 147, 148); and his connection with those complaints was only this: that he was informed by the Post-Office Department when he called before the Post-Office Department on another matter, namely, the Dennis indictment, that these complaints of Hout and Evans existed. Burton had never even heard of any such complaints until he went to the Post-Office Department. Harlan did not mention them when Burton was employed (Harlan's Testimony, Record, p. 189; Burton's Testimony, Record, p. 220). The fact was, as shown in evidence, that those complaints of Hout and Evans had been disposed of by the Post-Office Department by the investigation and report of the inspector detailed for that purpose in St. Louis, November 14, 1902, before ever Senator Burton was employed by the Rialto Grain & Securities Company.

All this talk of Inspector Cochran and the District Attorney about a "case" pending, merely because these letters of Hout and Evans were put into what they call a "jacket" and they in their office parlance call it a "case," cannot change the real facts of the matter, which were merely these, namely, that these letters of Hout and Evans were sent to St. Louis to be acted upon by the Inspector in charge there, and that by his deputy an investigation was made and a report made, which *ended the matter of the complaints in these two letters* (which were the only complaints that Burton ever knew about) until after he was indicted.

We say, therefore, that the matter of these two letters, the only matter of which Senator Burton had any information, had been disposed of by the duly constituted officers of the Post-Office Department before ever Burton was employed by the Rialto Grain and

Securities Company, and there the matter ended so far as any evidence in the record shows.

But Inspector Cochran and the District Attorney say, No, the matter of the Hout and Evans letters was not ended, because these letters were put into a "jacket" and a "case" was made up, and *no report was made back to Washington*, and *no entries were made on this "jacket"* as to what the inspectors in St. Louis had decided about the case, and therefore they say the matter was still pending before the Department. The District Attorney, therefore, says that Senator Burton rendered services in the "case" before the department. Why? Not because those complaints were still pending as live matters before the Post-Office Department, for the complaints of Hout and Evans were ended November 14, 1902, when Inspector Price made his report to Inspector Dice, in charge at St. Louis, that there was nothing in those complaints, and there the matter ended down to the time of the trial in this case; not because there was anything really pending in the department, but because, forsooth, entries had not been made in Washington on the "jacket" kept there, as to how the matter had been disposed of. In other words, there was not anything really pending before the department in respect of these complaints of Hout and Evans, but certain entries had not been made on the files of the department. Is a Senator to be convicted of a crime for inquiring before a department as to a matter which has really been ended, because the matter may be said by an official in the Post-office Department to be pending, because he has not yet made certain entries on his books or papers? If so, then the question whether a person was innocent or guilty would depend not on whether any real question was pending before the Post-office Department, but upon whether or not certain entries existed on the documents or books of the department, and it would never be safe for a person to go to the Post-office Department to make any inquiry about an old case which had been there, for fear that

possibly certain entries had not been made on the files of the department.

Obviously mere office methods or book-keeping methods of the Post-office Department can have no weight or bearing upon the question whether or not a person appears before the department in a matter or thing before the department. Senator Burton did not appear before the Post-office Department at all in respect of any complaint made against the Rialto Grain and Securities Company, and all that occurred with respect to any such complaint was that when Burton appeared before the Post-office Department in respect of the Dennis indictment, he inquired whether any complaints had been made against the Rialto Grain and Securities Company, and was informed of the letters of Hout and Evans. But even if it be assumed that the receipt of such information under such circumstances, was an appearance by Burton before the Post-office Department in respect of the Hout and Evans letters (although Burton expressly stated that he would not appear before the department on behalf of the company on any such complaints [Cochran's Testimony, Record, p. 147], and Cochran testifies, page 147, that there was no discussion between him and Senator Burton of the merits of the representations of Evans or Hout) yet those letters would be the only "matter or thing" in respect of which Senator Burton, by any possible technical construction of the statute, could be said to have appeared before the Post Office Department. The entire testimony of all the witnesses completely negatives the fact that he appeared before the Post Office Department generally in respect of any question of the issuance of a fraud order against the Rialto Grain and Securities Company. So that the "matter or thing," within the meaning of Section 1782 of the Statutes, with which Senator Burton was concerned, if he was concerned at all, was merely the Hout and Evans letters, and not the general question whether a fraud order should issue against the Rialto Grain and Secur-

ities Company. Cochran testifies (page 146) that he never had any conversation with Burton in reference to the question of the issuance of a fraud order (Record, pp. 146, 147).

The proposition of the District Attorney was that because, according to the custom of the Department they made up what they called a "case," by entering these letters of Evans and Hout on what they called a "jacket" before they sent them to St. Louis, and then whenever any other letters came in afterwards making complaints against the Rialto Grain and Securities Company, they were treated by the Department as a part of the same case, and entered in the same jacket, although they of course related to different transactions of the Rialto Grain and Securities Company; that therefore all these matters collectively constituted one "case" against the Rialto Grain and Securities Company, and that this one case was pending before the Post Office Department. If, however, the real facts of the matter be regarded, and these letters making complaints against the Rialto Grain and Securities Company be treated as separate letters making different complaints, all this talk about "case," "jacket," etc., being disregarded, as it ought to be, as a mere office method of keeping papers and as having no bearing whatsoever upon the construction of the words "matter or thing" in Section 1782 of the Statutes, then it becomes clear that the only "matter or thing" with which Senator Burton had any connection whatsoever were the letters of Hout and Evans and the complaints made in those letters, and that this matter or thing had been completely disposed of by the Department before Senator Burton's employment by the Rialto Grain and Securities Company.

The other letters and complaints which were entered in this so-called "case" were matters and things with which the testimony shows Senator Burton had absolutely no connection or knowledge whatsoever, and he did not even know of their existence until after he was indicted, and, as above stated, Sen-

ator Burton never appeared generally before the Department in respect of the question of the issuance of a fraud order, and the question of the issuance of a fraud order was never even mentioned or referred to in any of his conversations with Cochran, the only officer of the Post Office Department before whom he appeared; nor did Burton influence or seek to influence Cochran in respect of any question of the issuance of a fraud order, for that would have been impossible, as it was not even mentioned or referred to, and Cochran further testifies (Record, page 147) that there was not even any discussion of the merits of the representations of Mrs. Evans and Mrs. Hout.

The "case pending before the Department" and the "case which was still undisposed of," which were so much talked of by the District Attorney and by Inspector Cochran when Cochran's evidence was given, are at the utmost mere artificial creations of the Post Office Department for their convenience in keeping their records, and they have no bearing upon the real question whether, as charged in the indictment, Senator Burton rendered any services in any matter or thing within the meaning of the statute. The only matter or thing, as we have shown above, with which he had any possible connection, were the complaints in the letters of Hout and Evans, and he rendered no services before the Department in respect of those, for all he did was to inquire, and, before the time of the inquiry, those had been disposed of, as we have shown, and before he was ever employed by the Rialto Grain and Securities Company.

Furthermore, after Senator Burton had been informed by Cochran that these Hout and Evans letters had been sent on to St. Louis for investigation, Burton wrote to Harlan stating this fact in his letter dated November 20, 1902 (Record, page 94), and Harlan wrote back in his letter to Burton dated November 22, that—

"The claims that you have referred to against the Rialto Grain & Securities Company have been inves-

tigated by a Post Office Inspector connected with this Department, and he found the actions of our company to be all right, and, we are informed, made a report in favor of our company relative to the same."

After this, of course, Senator Burton never gave these Hout and Evans complaints another thought, and, as Cochran's testimony and Burton's testimony, and all the testimony, abundantly shows, he never even knew of the existence of any other complaints. How absurd, therefore, to say that Senator Burton appeared before the Post Office Department and used his influence in order to prevent the issuance of a fraud order, either in this matter respecting Hout and Evans, or in any other matter of which he had no knowledge or information.

Letters and Telegrams.

After this full review of the *res gestæ*, of the nature of Burton's employment and the services which he actually rendered, of what he knew and did not know, we are prepared to read the LETTERS and TELEGRAMS in the light of the circumstances under which they were written or sent or received.

And by way of preface we state that these letters and telegrams show:

1. That they had no reference whatever to any fraud order inquiry.

2. They related wholly to matters distinct from and having no reference to any fraud order, and these matters were not within the prohibition of Section 1782, were entirely proper, and were such as in no possible construction of Section 1782 was the United States "interested therein directly or indirectly."

4. They contain no admission of the rendering of any prohibited services or of any offense what-

ever and were mostly if not altogether irrelevant and incompetent—of no evidenciary value against Burton, but properly read and understood are evidence in his favor in disproof of the charge laid in the indictment.

An examination of this record, particularly with reference to the questions of the District Attorney, the rulings and charges of the Judge, will show that the attempt to make or support a case under Section 1782 depended wholly for its success upon the ingenious use and arrangement of certain letters and telegrams, passing between Senator Burton and Thomas B. Harlan, his associate as attorney and counsel for Dennis. The letters were, with one single exception as the record shows, voluntarily turned over to the Government by Senator Burton through his counsel at the request of the District Attorney after the indictment had been found. None of these letters could have been before the grand jury with the possible exception of one, of date February 11, 1903 (p. 139). The letters, of course, must be read in the light of the exact relation of Burton to the Rialto Grain and Securities Company, the nature of his employment, and the testimony heretofore fully given in this brief as to everything he did or was asked to do.

The letters for the most part fully explain themselves and corroborate in all essential particulars the testimony of Senator Burton, Mr. Harlan and Mr. Kastor in this case. Certain excerpts from these letters separated from their context were used to create a suspicion of the possible existence of facts which were not, as they could not be, adduced in proof. Restored to the context, these excerpts are susceptible of clear explanation; indeed, they could have no other meaning than one consistent with the statements of Senator Burton as to his relation to the Rialto Grain and Securities Company, and his entire freedom from any offense under the statute, much less the specific offense charged in the indictment.

It is our purpose to take these letters and telegrams *seriatim* in their chronological order, with a summation of the testimony appertaining to each and to show exactly what they mean, and conversely, to show that they could not possibly have the meaning into which they were sought to be tortured by the Government in its attempt to make a case against the defendant.

Letter November 18, 1902, Harlan to Burton.

The first letter appears upon pages 91–2–3, and is a letter written in pursuance of the employment of Senator Burton, and advises him that the terms of his employment have been accepted; that that employment was to begin immediately, and generally advises him with reference to the trouble between the Brooks Brokerage Company and Dennis, which might result in a criminal indictment and prosecution. *It had no relation whatever to the Rialto Grain and Securities Company* and had only relation to the possible trouble that might ensue to Dennis. Moreover, it enters into elaborate detail to satisfy Senator Burton that Dennis was innocent of all wrong, but might become the victim of the machinations of Brooks. It requests (and this was with reference to the possible criminal proceeding in St. Louis against Dennis in connection with the Brooks Co.) that he should obtain certain information with reference thereto. This letter contained no reference to Hout or Allen or the Rialto Company. It was upon the receipt of this letter and in pursuance of the request therein contained that the first interview of November 20, hereinbefore narrated, was had with Cochran (*ante*, pp. 54–65). This letter went in without objection.

Letter November 20, 1902, Burton to Harlan.

The second letter in the order is the reply to the last letter, and is to be found on page 94 of the record. It will be recalled that in this first interview Senator Burton asked Mr. Cochran if it was the purpose of the department to proceed against Dennis in the court at St. Louis by reason of his connection with the Brooks Brokerage Company. After Cochran stated that he did not know the purpose of the Government as to the indictment of Dennis a conversation ensued in which Burton asked Mr. Cochran in a general way about the Rialto Grain and Securities Company, and was informed by Cochran that the two complaints by Evans and Hout had before that time been lodged in the department and had by the department been referred on the 7th of November, 1902, to Inspector Dice, a Post-office Inspector in charge at St. Louis (p. 217).

It will be borne in mind that in that interview Senator Burton informed Cochran of his professional relationship to Dennis and the Rialto Grain and Securities Company, and further informed him that he would not or could not appear in any proceeding in the department, but asked that he be notified of any proceeding which might be taken with a view of giving his client an opportunity to be heard.

Read in the light of these facts this letter of November 20 bears its own explanation. In this letter he says that he has assured the department that it is the purpose of the Rialto Grain and Securities Company to comply strictly with the law, and that it is its desire to remain at all times in perfect harmony with the department. The clause of the letter which was commented upon injuriously to the defendant at the trial was the last paragraph, as follows:

"In return, if agreeable, you may make remittance for my first month's pay" (p. 94).

It was claimed that this was a "service" rendered before the department in the matter then pending, to wit, the complaints of Hout and Evans. The words "in return" are obviously a loose expression of "by return mail, if agreeable." His compensation had been fixed under an agreement, the terms of which had been made prior to the letter of November 18, and pursuant to the terms of the agreement, which is undisputed, Burton's compensation was to be monthly in advance, and his first month's salary was due before he went to the department at all. This was tortured into meaning that he demanded an express fee of $500 for this particular visit to the department and for obtaining the information conveyed in this letter of November 20.

In this connection we call attention to the following statement, appearing on page 94 of the record:

"JUDGE KRUM: I would like to have Mr. Harlan's reply to that letter read.

COL. DYER: I will read that in its order as I take them up one after the other. I expect to introduce them all."

But it will not fail to be observed that the District Attorney closed the case without ever introducing that letter. The letter is dated November 22, 1902, and is to be found on pages 175–6 of the record. As will be seen, it was introduced by the defendant in connection with Mr. Harlan's testimony. The omission of this letter by the Government is confirmatory of the charge which we here now make, of an effort upon the part of the prosecution to supplement the utter deficiency of proof to support the indictment not only by using excerpts from these letters dissevered from their context, but by omitting the one letter in the entire correspondence that is most important to the defendant, and which most clearly shows and establishes his entire innocence of the charge contained in the indictment—namely, a letter which conveys to him the information that the complaints of Hout and Evans were baseless; that they had been investigated by the department, and

the actions of the company were found all right, and the further information that Harlan was informed that a report to that effect had been made.

By reference to the testimony as to the several interviews contained in this brief it will be seen that Senator Burton then testified (p. 220), and there is no proof to contradict it, that from that time forward he believed the Rialto Grain and Securities Company to be absolutely free from any charge whatever in the department upon any score, because he knew, and Cochran confirms him in such statement (p. 148), of no other complaints that were or ever had been made, or were ever pending in the department except the complaints of Hout and Evans, which had been reported as unfounded. Both Dice, the inspector in charge, and Price, the inspector under him, confirm the statement made by Harlan in this letter that the complaints of Hout and Evans had been investigated and a favorable report made on the 14th of November before the time of Senator Burton's employment and the said complaints were found to be groundless (see Record, pages 70 and 202–3). In other words, and we desire to make this point clear and emphatic, that, notwithstanding Cochran had mentioned these two complaints on the 20th of November, when Burton had his first interview with him, they had at that time been investigated and a report in favor of the company had been made.

We desire to advert again to that portion of the letter of November 20, which was used to the prejudice of Senator Burton at the trial; namely, his request for a remittance. In this letter of November 22, Harlan says :

"I enclose the Company's check for $500, *as per agreement.* This check should have been sent in my former communication, but I neglected to do so" (p. 175).

In other words, before Burton should have gone, or in fact had gone to the department at all, the $500 were due under their agreement and for the purposes

of the agreement, and no other, and before he received any money whatever (this being the first payment) he is notified that the only matter or thing ever pending before the department had been investigated "*and the actions of the Company found all right*" (p. 175; see, also, pp. 70, 202).

Letter of Harlan to Burton, November 22, 1902 (Text of *ante*, p. 64; Record, pp. 175, 176).

Letter December 2, 1902.—Harlan to Burton.

The next letter is the letter of December 2, 1902, on page 135–6 of this record. It appears in Harlan's testimony that he went to Washington in pursuance of the suggestion contained in the letter of November 22, to consult with Burton in reference to the troubles of Dennis, growing out of his purchase of the assets and business of the Brooks Brokerage Company, and to discover if possible the intention of the Government with reference to the prosecution of Dennis in that behalf. The letter of December 2, above referred to, is a letter written by Harlan to Burton upon Harlan's return to St. Louis. Much stress was laid upon this letter. *To this letter Senator Burton made no reply whatever.* In pursuance of this letter, or on account of any suggestions in it, he did not at any time visit the department or confer with any public officer of the Government. It conveys information for the most part, namely, that Dennis, whom Harlan insisted was absolutely innocent of any wrong, and as only embroiled by reason of his purchase of the Brooks Brokerage Company and the vindictive pursuit of him by Brooks, had been indicted and that by reason of such indictment he apprehended that a large number of complaints might be filed with the Post-office Department by those doing business with the Rialto Grain and Securities Company. It appears that this

apprehension was unfounded, because no such complaints were filed. The language of Harlan to which significance is attached by the prosecution in this letter is this:

"Locally, I believe we will be able to control the situation, as this business has been pretty thoroughly gone over by the inspectors, and they understand just what we are doing and how we are doing it. At your end of the line you will, of course, use your own judgment in handling the situation. We will at all times be glad to observe any request made by the Post Office Department, or to submit to any examination they may direct."

And the letter concludes by stating that the Dennis cases for which Burton had been employed in the first instance were set for trial on the 6th of January, and that Judge Krum and Harlan were then prepar ng for trial; that they would get the evidence together, and when they had got] all this done they would submit the whole case to Senator Burton for his consideration, and would certainly appreciate it very much if he could come West and engage in the trial (p. 136). This shows what Burton's relationship to the Rialto Grain and Securities Company was, and is confirmative of Burton's statements on that subject.

Burton never answered this letter. He never made any visit to the Department by reason of this letter. He never rendered any "services" in respect of complaints in the Department. In fact, no such complaints were made, and Harlan's fears were groundless.

There was no occasion for his visiting the department; he had nothing to say to the officers of the department if he got there; he had told Cochran that he would not participate in any way in the slightest, even if he thought the Government was oppressing his client in that behalf towards making an appearance or influencing any public officer. This is confirmed by Harlan's testimony with reference to his purpose of writing the letter and his understanding of the nature of Senator Burton's employment and the

duties he was expected to perform (see pages 183–4 of Record).

An effort was made in the cross-examination of Harlan by the prosecution to show that Senator Burton was expected to attend to all matters in the department under his employment, and that his employment was of that nature, and this letter was used a basis *for such examination. It was pertinently asked by* the witness in response to these questions of the Government prosecutor, *What matters there were before the department?* (Rec., p. 192). There was none to the witness's knowledge, and none has been shown to be there pending. That it was perfectly natural for Harlan to write this letter and other letters, keeping Senator Burton, who was general counsel of the company, thoroughly advised of all matters pertaining to the company, and that he would expect Senator Burton to act in any proper manner, leaving the matter of propriety entirely to his discretion and judgment, is the exact fact of this case.

Letter of December 3, 1902, Harlan to Burton.

The next letter appears upon page 137 of the record, and was written on December 3, 1902, the day following the writing of the last letter, to which, as we have said, Senator Burton made no reply, and concerning which he took no action whatever. This letter of Harlan of December 3 illustrates, however, that in his capacity of general counsel for the company, Burton was being advised by its local counsel, Mr. Harlan, of all matters concerning the company. This letter has no sort of relation to the charge alleged in the indictment. It is a letter advising Senator Burton that two men by the names of BOWMAN and SHOVE had probably falsely represented themselves as Post Office inspectors for the purpose of enforcing unjust demands against the Rialto Grain

and Securities Company, and it was written to Senator Burton merely to advise him of the facts. That is made clear by the following language: "I call it to your attention merely as a matter for your own information" (p. 137). And it is written for the further reason, as Harlan testifies, to try to uncover what he believed to be a fraudulent purpose towards his company (p. 201). The latter part of the letter however, shows the great desire of Harlan to keep Burton advised of the criminal proceeding against Dennis. It certainly does not, as we shall presently show, prove or tend to prove the crime alleged in the indictment. This letter was the occasion, as is shown by the preceding proof, of one of the visits of Senator Burton to Cochran.

Letter December 9, 1902, Burton to Harlan.

The foregoing letter of Harlan of December 3, was replied to by Senator Burton in a letter which is next in order and which appears on page 136 of the record and is dated December 9, 1902. The letter informs Mr. Harlan of the result of Senator Burton's interview as to whether there were any such inspectors as *Bowman* and *Shove*. It states: "There has gone from this office no instructions whatever about the Rialto Company, and there is nothing in this office against you at this time." This is, of course, responsive to the request to know whether the Government was, as was suggested in Harlan's letter, proceeding in a covert way to entrap the Rialto Company; and the following sentence "the matter in St. Louis, as you know, is in the hands of Mr. Dice there" is a suggestion not with reference to any complaint, but refers to the prosecution of the indictiment against Dennis. Certainly, it has no reference to any "pending inquiry" in the department within the knowledge of Senator Burton, because, as has been seen, Senator Burton was fully advised that the only two complaints

of which he had any knowledge whatever had been investigated in St. Louis and reported favorably to the Rialto Company. It is in evidence in this record that Dice was there as the representative of the department, assisting in the prosecution of Dennis. The letter has reference to this. This is further shown by the rest of the letter (p. 136) and by Burton's testimony (pp. 219, 220). Certainly, the language does not admit of the construction under the testimony as it appears was sought to be given to it by the Government, that it had reference to the Hout and Evans complaints; for Burton understood these were at an end (p. 220).

Much stress was laid on the concluding expression in this letter: "I will take care of things at this end of the line." This must, of course, be read in connection with that immediately preceding it; namely, a suggestion that Harlan should prepare carefully the case of Dennis for early the next month and that he must watch carefully to secure a fair and impartial jury; and the further suggestion that "these are all important matters which you must carefully consider," followed by the suggestion, "I will take care of things at this end of the line," meaning that he will prepare and care for any matters relating to the subject under discussion, namely, the Dennis investigation, that is required from him in Washington. So far as Burton knew there was no proceeding pending on the subject of a fraud order. This letter cannot be distorted to mean that he will seek to influence the department or any officer of the Government to prevent a fraud order issuing against the Rialto Grain and Securities Company. It must, like all the other letters, be read in the light of the facts of this case, among which is the fact that there was nothing in the Department for Burton or any one else to "take care" of, and this very letter so states.

The testimony bearing upon the letter of December 9 will be found collated in this brief relating to the second visit of Burton to Cochran, to which we refer

(*Ante*, p. 65). It will appear therein that the *sole purpose* of the visit was to make an inquiry as to these bogus inspectors, and Cochran and Burton both so testified. We refer to pages 140 and 219 of the record.

This letter was signed not by Burton in person, but by his Secretary, Smith (p. 211), and the expression "I will take care of things at this end of the line" is, of course, not the "rendering of any services" within the meaning of Section 1782; it is not any admission of an offense or services and is without any legal significance or effect.

It is positively established that the signature to that letter was written by Smith, Burton's private secretary, who was in the habit of dictating and writing letters for the Senator and signing Senator Burton's name to such letters (p. 211), and while Smith, in his testimony, is not positive that the words "I will take care of things at this end of the line" are his own, he states as follows:

"I am inclined to think that is an expression of mine, although I am not positive about it,"

and Smith gives his reasons therefor (Record, p. 212).

Telegram of February 5, 1903, Harlan to Burton.

The next in chronological order is the telegram appearing on page 222 in Burton's testimony, from Harlan to Burton, dated February 5, 1903, as follows:

"FEBRUARY 5, 1903, ST. LOUIS, MO.

"TO THE HONORABLE J. R. BURTON,
State Annex, Washington, D. C.

Dice delivered our books to State authorities where they are held subject to his order. Get order requiring him to deliver to us. Col. Dyer told me he had no further use for them." [Signed Thos. B. Harlan, p. 143].

It is necessary, to make this telegram intelligible, to go into the record to show what caused the sending of it. And this is also necessary to an understanding of the purport of the letter of February 11, relating to the same matter. It will appear on pages 141–2–3 and 221 of the record that Burton had visited Cochran on January 24, at the time when Burton had been advised that Dice was threatening to turn over these same books and records to the State authorities in St. Louis. These books of record relate wholly to the Brooks Brokerage Company, and had been used in the trial of Dennis, who had been acquitted on January 20, 1903 (p. 210), and there was no pretense that the Government had any further use for them. In company with Cochran, Burton went to the Fourth Assistant Postmaster General and the three to the Postmaster General, which last visit resulted in the Postmaster General ordering Mr. Cochran to send a telegram with reference to the matter (see pages 142-3 of the record). At this point the Court, realizing how far afield the investigation had gone, sustained an objection to the introduction of Cochran's telegram. The threat that was made in January by Dice to turn the books over to the State officers seems to have been carried out, and Burton received the telegram heretofore referred to of February 5, to that effect, and that was the cause of the last meeting, February 5, 1903, between Cochran and Burton, as testified to by Cochran on pages 143–4, and by Burton on pages 222–3. As the result of that interview, Cochran agreed to send a telegram of inquiry the next morning, which presumably he did, because Burton seems to have been advised by telegram that a satisfactory adjustment of the matter had been effected. That last telegram is the telegram referred to in the letter of February 11 (p. 139). That telegram is not in evidence, but is referred to in the letter, and the substance of the telegram is indicated by the letter.

Letter February 11, 1903, Burton to Harlan.

This brings us to the letter of February 11, 1903 (p. 139), which we might say, although it has no relation whatsoever to fraud orders or to any matters pending before the department, has nevertheless served as a keystone to the arch of this prosecution. It appears by this record that it was the only letter connected with the relation between Burton and the Rialto Company in the possession of the prosecution at the time of the presentment of the matter to the Grand Jury in St. Louis. And it was upon the distortion of this letter from its true relationship to the facts that, as we are advised, his conviction was largely secured. This letter was written and signed by Burton's secretary Smith (p. 211). This letter, of course, as all letters must be, should be read in the light of contemporary events and circumstances and should be limited in its interpretation to matters concerning which it must of necessity have related. Thus read, this letter relates entirely to the Brooks brokerage books, which Dice had turned over to the State authorities, who then (February 11) held them *subject to Dice's order*. Read in the light of the *res gestae*, it is plain that this letter has no relation to the charge in the indictment that Burton rendered services in the P. O. Department to prevent the issue of a fraud order. It must be borne in mind that correspondence had been progressing for weeks between Harlan and Burton with reference to the affairs of the Rialto Company; that since the inception of that correspondence there had been no reference whatever to *any pending fraud orders before the department*. In fact there was no such question pending in the department, as we elsewhere have shown (p. 87 of this brief). It must be further borne in mind that the only matter of complaint before the department of which Senator Burton was shown to have any knowledge whatever

had long since ceased to be of any importance and had faded entirely out of thought of either Harlan or Burton. This letter therefore can have no reference to any such matter.

The testimony to which we have called the Court's attention relating to the books of the Brooks Brokerage Company shows that there was on the part of certain officers of the Government a determined effort to keep these books and to use them to the injury of Dennis and the Rialto Company. It was desirous that the department should be first impressed with the injustice of such course and of the total want of relation between the books and any possible disclosures that might be obtained from them and that they had no relation whatsoever to Dennis and the Rialto Company, and that it was important to advise the department upon these points. That telegram, therefore, is to the effect that a satisfactory arrangement had been made with Dice with *reference to these books.* It can have no reference to anything else, because that was the only subject of any communication between Harlan and Burton at the time. The letters say "I have your telegram telling me that things were satisfactory between you and Dice," namely, that Dice had finally agreed to restore these books. "I hope you are not letting him mislead you in any way." That sentence was inspired by the fact that the prosecution against Dennis was in the opinion of both Senator Burton and Harlan vindictive and unnecessary and that Dice was the most active agent in such prosecution. He informs Mr. Harlan he "will be in St. Louis the fore part of next month, as soon as congress adjourns, and shall remain several days. Be sure to keep me advised if there is anything to do at this end of the line before going away," which means simply that if the Dice matter be not satisfactorily adjusted, it may be so. He says "I have tried to keep the department in good humor with Major Dennis and think I have succeeded." That is with reference to this prosecution

and the friction growing out of the effort to obtain the restoration of the books. It had no relation to any complaints against the Rialto Company or to the issue of a "fraud order." He says "If agreeable on the receipt of this, I wish you would have my month's pay sent in so I can reach it by Monday next." Probably meaning *receive* it by Monday next. The fact that he said he was trying to keep the department in good humor with Major Dennis would exclude the hypothesis that he was trying to do anything for the benefit of the Rialto Company with reference to any pending complaints. On the contrary, the reference to Major Dennis would show that he was endeavoring to show to the department that Major Dennis was entitled to its good offices in the return of these books, which were important to him—which were necessary to his own protection, and which were sought to be used to further vindictively prosecute him by an officer of the Government of United States. This is a natural explanation of this letter. To explain its terms upon any other hypothesis of its meaning would necessitate upon the part of the government that it should point out what particular occasion there was other than the one we have narrated on February 11, to keep the department in good humor with Major Dennis. At that time there is not a syllable of testimony showing that there was anything before the department concerning Major Dennis or the Rialto Company. Major Dennis had been acquitted of the charge that had been made against him by the Government in St. Louis. No inspection of the office of theRialto Company was being had and no complaints, so far as Burton knew existed or were being filed. So, therefore, this letter can only be given the meaning which we have ascribed to it. Certainly the Government of the United States has in no wise connected it with any efforts on Burton's part to prevent the issue of a fraud order, the only charge in the indictment.

The above and foregoing letters which we have considered fully are the only letters introduced by the Government. In the course of the testimony of Harlan, reference is made to two letters of Senator Burton that were returned to him and by him destroyed. It appears in the proof that these two letters had no relation whatsoever to the questions involved in the prosecution of the relationship of Burton to Dennis, or the Rialto Grain and Securities Company, but *were entirely of a private nature*, and the Government of the United States did not show or attempt to show otherwise. In confirmation of this statement we refer to pages 180, 181 and 201 and 225 of the record.

It also appears in the testimony of the witness Mahaney that two letters were destroyed by him at Burton's request (see Record, pages 121-2-3) This testimony of Mahaney is positively denied by Senator Burton (see pp. 224-5 of the Record). But the importance of this disclosure disappears when Mahaney is compelled to admit that the letters so destroyed were merely confirmatory of two telegrams which are in evidence in the case (see pp. 127-8 of the Record). Neither of these telegrams is in the remotest degree material or relevant to the issues in this case.

Telegram, February 11, 1903, Burton to Harlan.

There are also in testimony a number of telegrams. The first telegram appears on page 125 and is in response evidently to a telegram which is not in the record, but it is obviously in response to a telegram asking for the standing of one S. M. McGowan, of the Indian Department. It palpably has nothing whatever to do with any matter connected with the Post Office Department; was introduced to aid in producing the poisonous cloud of suspicions which was engendered by the letters which have been considered and we will discuss in its place the error of its intro-

duction and in the refusal of its exclusion. (Rec., p. 126.)

THE NEXT TELEGRAM is upon page 126 of the record and relates to the same matter.

Telegram, February 14, 1903, Mahaney to Burton.

The telegram of February 14 is next in order, appearing upon page 129 of the record. It relates wholly to a State investigating committee that was in St. Louis proposing to investigate the matters of the Rialto Company, and has no relation whatever to any matters before the department or to this case. But it shows that Burton was called upon for professional services *wholly outside of any federal matter*. There was apparently no answer made to this telegram, because none is introduced.

Telegrams of February 17, 1903, between Mahaney and Burton.

The next are the two telegrams of date February 17, appearing on page 130 of the record, one from Mahaney to Burton, and the other from Burton to Mahaney in answer, and relate entirely to the mailing of the check that was due Burton.

Telegrams, February 25, 27, 1903, between Mahaney and Burton.

The next telegram appears on page 128 of the record and is a telegram from Mahaney advising Senator Burton that there was a report from an apparently reliable source that two special inspectors had been appointed to investigate the Rialto Company and report to the Postmaster-General, and he was asked to verify this re-

port and advise them. The telegram is mere inquiry. The next is Burton's answer to that telegram, appearing on page 128, of date February 27, to the effect that there was no complaint in the department against the Rialto Company, and saying that he would write full particulars by mail. The defendant had the right to answer the inquiry made of him, and violated no law in so doing. This was at most an inquiry whether a matter was pending in the Department and was met with the answer that there was no matter pending. It could not then possibly be a service rendered in a matter pending before the Department. The significance of this message in Burton's favor is that Burton understood at that time there was no complaint in the department against the Rialto Company, which fact confirms what we have stated as to the letter of February 11, and Burton's testimony that he never knew of any complaints except Hout and Evans (p. 220).

Before leaving the subject of these letters and telegrams, we call the Court's attention to the fact that all of them that were within the keeping of Senator Burton or his counsel were voluntarily turned over to the government, and that includes all the letters except the letter of February 11 and another letter of January 19, in the possession of the prosecuting attorney, which was not introduced in evidence. That situation appears on page 228 of the record, where Col. Dyer makes this statement:

"It is admitted by the defendant that his two letters, one bearing date January 19, 1903, and the other bearing date February 11, 1903, were never in the possession of Judge KRUM or the defendant after they were written, or of Mr. Harlan at any time.

Judge KRUM: The admission goes to the extent that those two letters were not among those that I practically turned over to Col. Dyer."

See, also, in connection with this fact Burton's testimony (Record, page 256), and Harlan's testimony on page 181, in which it appears that these letters were

in Burton's possession after his indictment and were by him, through his counsel, turned over to the Government.

The Employment and Actual Services Rendered by Senator Burton as General Counsel, Having no Relation to any Matter Charged in the Indictment, and Not Prohibited by Section 1782, Which Services Were Paid for by the Defendant's Monthly Salary as General Counsel.

The employment of Senator Burton by the Rialto Grain and Securities Company was, as the testimony shows, suggested and influenced by his friend, Mr. Kastor, a man in nowise connected with the Rialto Grain Company. The nature and scope of that employment is shown by the testimony of Kastor, Harlan and Senator Burton himself, and is nowhere contradicted or attempted to be contradicted in this case. We refer to all of Kastor's testimony beginning on page 78 and extending up to and including page 90. Harlan's testimony, pp. 170 to 173 inclusive. Burton's testimony, pp. 215 and 216.

Senator Burton's employment was as this uncontradicted testimony shows, by reason of apprehended troubles and difficulties in court in St. Louis growing out of and relating to Dennis's purchase of and in connection with the Brooks Brokerage Company, and, as Harlan and Burton fully testify, with a view to securing his aid in enlarging the Rialto Company's business in the sale of securities. He was to be retained as general counsel of the company at a stipulated salary of five hundred dollars a month, to be paid monthly in advance. Under the terms of the agreement made between Burton and Harlan subject to the ultimate approval of Dennis, Senator Burton

was entitled to receive the agreed monthly salary whether he performed during that month any services or not. And it was expressly understood that he was to perform no services inconsistent with his duties as United States Senator in the departments or that should limit or interfere with his duties as United States Senator, during the session of the United States Senate (*Ante*, pp. 13–16).

Therefore, the compensation agreed upon was not and could not have been any recompense for services before the department in preventing a fraud order or otherwise. As a matter of fact, the most important services rendered by Senator Burton had no possible reference to any matter before the department against the Rialto Company. That appears again and again and abundantly throughout this testimony. The letters, most of which were introduced, have, as we have shown *ante*, pp. 95 *et seq.)*, reference entirely to the prosecution, in the Federal Court in St. Louis, of Dennis and Garland, and complications and difficulties growing out of such prosecution. That services, and substantial services, were rendered by the defendant in that behalf is also conclusively shown. To begin with, a full and complete consultation with reference to the affairs of Dennis and the particular matters involved in the Brooks Brokerage controversy was had at the time of Burton's employment (see pp. 91–2–3 of Record). Second, shortly thereafter Mr. Harlan came to Washington and had another conference lasting for two days, over these same matters, at which time we must not fail to note that neither Burton nor Harlan visited any department of the Government on any business relating to the Rialto Grain and Securities Company. The time was consumed entirely in discussing and going over these matters (see pp. 177, 190, 198 and 199 of Record, Harlan's Testimony. See also letter on page 136). Third, Major Dennis visited Washington to confer about his affairs with Senator Burtou, and their conference was concerning his affairs relating to this

matter and others, and although Major Dennis and Mr. Burton made a casual call upon W. E. Cochran, it was only incident to the Senator's ordinary visit to the department and by way of showing Major Dennis about, and, as fully appears, no conversation took place relating to any fraud order before the department (see pp. 118, 178 and 220 of the Record). Fourth, Senator Burton went to St. Louis for the purpose of consultation and discussion with reference to the Rialto Company's affairs, and particularly the matters affecting Dennis (see Record, pp. 119, 120, 177, 178, 185, 186, 227 and 228).

In the line of his duty as general counsel of the company, it appears in the record that he was called upon particularly in the McGowan matter, to find out and report whether McGowan, who had appeared in St. Louis claiming to be an Indian Agent, was an Indian Agent, and as to the character and standing of the man, the claim that he was presenting to the company, as Harlan testifies, being by the company regarded as outrageous. He also was called upon to obtain the restoration of the books of the Brooks Brokerage Company, which Dennis had turned over to the Government for use in their prosecutions against him, as well as others. He was asked to render services in respect of the *State* investigation. These were important services entirely outside of and having no possible relation to the prevention of a fraud order, and were such services as he might properly perform as counsel of the company.

By way of further illustration of the nature of these services and that the services he rendered were actual and substantial, we desire to call attention to the paragraph contained in the letter of December 2, beginning on page 135 of the record, the matter quoted appearing on the following page. It is as follows:

"The cases here are set for trial on the 6th of January, and Judge KRUM and I are preparing now for trial. We will get all the evidence in shape. I will thoroughly brief the law pertaining to the cases and

when we have got matters worked out, we will submit the whole case to you for your consideration, and would certainly much appreciate it if you could find it convenient to be here to participate in the defense."

The completed case thus prepared was brought on from St. Louis to Washington by Dennis upon the occasion of his visit on the 15th of December. After having gone through the case Burton went to St. Louis by appointment, and being fully advised in the matter entered into and had a full consultation with his associate counsel in St. Louis, on the 24th of December. All this was wholly outside of any services in the P. O. Department. The $500 per month covered all services that Burton agreed to render.

In addition to the services so rendered, as it appears from the testimony of Kastor (p. 81 of Record), and of Harlan (pp. 194–5), and of Burton (p. 227), he consented to become the general counsel of the company, and that his relationship to the company in that respect should be public, and that they should print his name along with the other officers of the company upon their letterheads and other literature. This, as Harlan said, Dennis would regard as in and of itself valuable to his company. In every respect he was held out to the world and treated by the company as its general counsel. At the time of his employment Harlan had brought to his attention particular work and services which Burton was expected to render to the company in connection with the establishment of a department of its business for the sale of securities, and no one can read Harlan's testimony without being impressed by Harlan's faith and belief that this business might be made large and lucrative by disposing of railroad and other securities taken by the trust companies under schemes of underwriting various enterprises and disposing of the same to investors upon commission, the company having extraordinary facilities for reaching the investment world.

Shortly after his employment, Senator Burton, in the preparation of this work, took the matter up with

Senator W. A. Clark, and afterwards made a visit to New York, but owing to the physical and mental collapse of Major Dennis immediately after his trial in the latter part of January, nothing came of this branch of the business. Harlan and the other officers of the company at the time of the Senator's employment and up to as late as March 1, 1903, fully expected that this feature of the business would be promoted (see Kastor's Testimony, pp. 86–7. Harlan's Evidence, pp. 171–2; also 182–3; also 188–9; also 191–2. See Burton's Testimony, pp. 216, 226–7).

IT WAS FOR THESE SUBSTANTIAL SERVICES AND OTHER SERVICES in the line of the duty of a general counsel, which were wholly and distinctly outside of any fraud order inquiry, that the monthly salary of the defendant was paid, and such payment was not compensation for alleged services to prevent a fraud order in a supposed or mythical "case" or "inquiry."

We elsewhere fully show that if there was any such "case" or "inquiry" pending Burton had no knowledge of that fact (see this Brief, pp. 84–95).

Final Conclusion as to "Services" Stated.

We have above produced all of the evidence that has the slightest bearing upon the actual acts and conduct of Senator Burton in any of the departments at Washington, or in any talk, conference, request or conversation to any public officer in relation to the affairs of the Rialto Company. We have analyzed and stated in their true relation to these facts every letter and telegram which appears in this record, and we desire to say in one comprehensive phrase that under these two heads is contained every atom of proof adduced by the Government against Senator Burton in support of the charge contained in the indictment. And we submit to any impartial mind, to any free and unprejudiced intellect, whether there is to be found in any part of it, or in it all taken together, the shadow of confirmation

or support to such charge. We have insisted and still continue to believe, as matter of law, that even had Senator Burton gone before the department in a controversy arising between a customer of the Rialto Company and the Rialto Company itself as to whether such company had subjected itself to the operation of the statute known as the "fraud order law" he would not have committed any offense denounced by Section 1782, Revised Statutes. But here is a case that shows, if it shows anything, that that is exactly what he did not do or attempt to do.

Finally, therefore, the letters and telegrams are totally inadmissible and immaterial for any purpose unless they are shown to be related to and connected with an act in violation of the statute, and they are not so shown.

WE FEEL CONFIDENT THAT THIS REVIEW OF THE EVIDENCE fully sustains our Second Point *(ante*, p. 20) that there was no evidence in the case to establish the guilt of the defendant, and that the Court erred in refusing, at the close of the Government's case (page 165), and also at the close of the trial (page 229), to direct the jury to return a verdict of not guilty.

III.

RE THE PAYMENTS BY CHECKS AND ITS EFFECT ON THE JURISDICTION OF THE COURT.

On the stipulated and undisputed facts as shown on the trial, the payments made by the four checks to Senator Burton were made in Washington and not in St. Louis, and the Court in St. Louis had, under the Constitution, no jurisdiction of the alleged offenses based on the checks, as set forth in counts six, seven, eight and nine of the indictment.

The evidence with respect to the deposit and payment of these checks was brief, simple and undisputed. It consists of the testimony of ARTHUR T. BRICE (a witness produced on behalf of the United States), occupying but three and one-quarter pages (Record, pages 105–108), and of the stipulation (Record, page 111, paragraph eighth), and of the checks themselves (Record, pp. 102, 103, 105, 112 and 113). The testimony of Arthur T. Brice, above referred to, was the Government's own testimony. The defendant Senator Burton did not produce any witness to contradict the said witness, Arthur T. Brice, and there was no conflict of testimony whatsoever as to what were the facts as to the deposit and payment of the said checks.

THIS TESTIMONY was briefly to the effect (page 106) that "this check was deposited in the Riggs National Bank to the credit of Senator Burton." "It was passed to his credit at that time" (page 108). "We had no special agreement with Senator Burton." "Upon the deposit of a check, endorsed by him, it was passed to his credit, and he was at liberty to check against the whole amount standing to his credit, in-

cluding the amount evidenced by the check itself." "If, for instance, he had a balance there to his credit of $1,000 and deposited a check for $500, and that was passed to his credit, that gave him a balance of $1,500 to check against. He might draw the whole of it without waiting to hear from the check."

The stipulation was (Record, page 111):

"The checks mentioned in counts 4, 5, 6, 7, 8 & 9 of the indictment 4992 were duly received by the defendant in Washington, D. C., and by him endorsed and deposited with the Riggs National Bank of Washington, D. C., and were afterwards duly paid by the Commonwealth Trust Company at St. Louis, Missouri, and that the said checks and all of the endorsements thereon may be introduced and used in evidence in the trial of said cause."

The only other evidence in regard to the payment of the checks is what is shown by the checks themselves and their endorsements (Record, pages 102, 103, 105, 112 and 113).

The facts, therefore, were simple and undisputed. Furthermore, as the facts were shown by the Government's own witness the credibility of the witness could not be questioned by the Government.

What we say, therefore, is that on these simple and undisputed facts, there was nothing to leave to the jury, but that as a matter of law, as shown by the numerous decisions of this Court and other courts referred to on this brief, the trial Court should have held that as respects these checks there was no payment made to Senator Burton in St. Louis, and should have excluded from the case and from the consideration of the jury all these checks and the evidence in regard to them and the evidence in respect of alleged services for which these checks were payment.

Instead of doing this, the Court, as above stated, permitted the jury to guess the rule of law applicable to these facts, and the jury made an erroneous guess, as the verdict shows.

This question arises on the record, not only on the

objections and exceptions which were made to the introduction of these checks (Record, page 102, middle), but also on the Court's charge to the jury in respect of these checks (Record, page 236–238 inclusive), to which instructions the defendant specifically excepted (Record, page 245, middle).

"JUDGE KRUM: Under Counts six, seven, eight and nine, the defendant excepts as to that part of the charge which submits the question of fact to the jury in the matter of payment.

THE COURT: That is clear enough. I can identify all of that."

The same question also arises under the instructions requested by the defendant and refused by the Court as to these checks, namely, instructions 10 and 11 (Record, page 244); also by the defendant's motions to direct a verdict for the defendant as respects each of the counts on the checks (Rec., pp. 165, 229).

A.

The Government's own evidence—brief, simple and undisputed—in the record shows that the four checks, when they were paid in St. Louis, belonged neither to Burton nor to the Riggs National Bank of Washington, but in the instance of each check to a subsequent endorsee, which was the owner of the check, and payment to such subsequent endorsee was not payment either to Burton or to the Riggs Bank. Neither the Riggs Bank nor any other bank was agent of Burton.

Take the check of November 22, 1902 (Record, pages 102–3), where a copy of this check and its endorsements are set forth. This check was payable to the order of J. R. Burton, and was endorsed on the back as follows:

"J. R. Burton.

Pay Commercial Nat'l Bank, Chicago,
or order,
The Riggs National Bank
of Washington, D. C.
Arthur T. Brice, Cashier.

Pay Franklin Bank
St. Louis, Mo. or Order,
Commercial National Bank
of Chicago,
Jos. T. Talbert, Cashier.
L. Kraemer, A. Cashr.
(Perforated) Paid."

There is in the record absolutely no testimony whatever to change or alter or contradict the legal effect of these endorsements. The first endorsement is an absolute endorsement by J. R. Burton. It was shown by the oral evidence that this check was on this endorsement deposited by Burton in the Riggs National Bank of Washington, and that Burton was given credit for the amount. In other words, Senator Burton *transferred the title* to this check to the Riggs Bank and the Riggs Bank became thereby indebted to him upon account for the full amount thereof, and thereupon and thereafter the relation of debtor and creditor existed, the bank being the debtor and Burton being the creditor. The title to the check, however, passed absolutely to the bank, and thereafter Senator Burton could neither recall it nor reclaim it nor have any further control of it. It was the property of the Riggs National Bank to deal with it as it pleased. Of course, Burton was liable on this check as an endorser, and that was thereafter his only relation to this check. The fact that he was endorser, however, did not prevent the absolute title passing to the bank, the same as in the case of any transfer of negotiable paper—the fact that there is an endorsement does not prevent the absolute title from passing. On the contrary, such endorsement and delivery are the means of transferring title thereto.

The Riggs National Bank of Washington, having this check, disposed of the same as follows: It endorsed this check absolutely to the Commercial National Bank of Chicago or order. There is absolutely no evidence in the record to contradict or qualify the legal effect of this endorsement, which was to *transfer the absolute title of the check to the Commercial National Bank of Chicago.*

So, also, the Commercial National Bank of Chicago, having the absolute title to this check, in turn *transferred the title to the Franklin Bank*, of St. Louis, Missouri, or order, by an absolute endorsement. There is absolutely no evidence in the record to contradict or qualify in any way whatsoever the legal effect of this absolute endorsement.

The check bears this further endorsement:

" L. Kraemer, A. Cashier,
(Perforated) Paid."

Kraemer was, presumably, the assistant cashier of the Franklin Bank of St. Louis, Missouri, to which bank, *as owner of this check*, payment was made by the Commonwealth Trust Company in St. Louis, the trust company on which the check was drawn.

[NOTE: Especially that neither the first endorsement, *i. e.*, to the Reggs bank, nor any subsequent indorsement was "*for collection*," but that *all* of the indorsements were absolute and unconditional.]

The other three checks—to-wit, the check dated December 15, 1902 (Record, page 105); the check dated January 22, 1903 (Record, page 112); and the check dated February 16, 1903 (Record, page 113), all show similar *absolute* endorsements, and there is also in the case of those other three checks absolutely no testimony whatever contradicting or qualifying the legal effect of these endorsements. On the contrary, as Burton received immediate credit on his pass book for the checks from the Riggs National Bank when he endorsed and delivered the checks to that bank, this

credit supports the legal effect of the endorsements and does not contradict or qualify the legal effect of the endorsements.

The testimony of Arthur T. Brice, cashier of the Riggs National Bank of Washington, was to the effect that this bank put these checks in the course of collection through its correspondents. There was not, however, any testimony whatever to show the legal relations between the Riggs National Bank and its so-called correspondents, and as above stated, there was absolutely nothing whatever to qualify the legal effect of these absolute endorsements.

We need only call the attention of this Court to the fact that an endorsement and delivery of negotiable paper passes the title to such negotiable paper. This fact of these absolute endorsements is therefore under the law sufficient to show the absolute transfer of title to these checks; and we repeat there is not a particle of evidence in the record to contradict or qualify in any way the legal effect of such endorsements and consequent transfers of title to these checks.

On these facts, therefore, these checks were paid in St, Louis not to J. R. Burton, not to the Riggs National Bank of Washington, but the check of November 22, 1902, was paid to L. Kraemer, A. Cashier, as is indicated (Record, page 103) by the stamp endorsed thereon, as follows:

"L. Kraemer.
A. Cashier.
(Perforated) Paid."

and the check of December 15, 1902, was paid to the National Bank of Commerce in St. Louis as is also indicated by the stamp on the back of the check, as follows (Record, page 105):

"St. Louis Clearing House.
26
The National Bank of Commerce in St. Louis.
Dec. 22, 1902.
(Perforated) Paid;"

and the check dated January 22, 1903, was paid to the National Bank of Commerce in St. Louis, as is indicated by the stamp on the back (Record, page 112), as follows :

" 26
St. Louis Clearing House.
The Nat'l Bank of Commerce in St. Louis.
(perforated) paid ; "

and the check dated February 16, 1903, was paid to the Franklin Bank of St. Louis, as is indicated by the stamp on the back of the check (Record, page 113), as follows :

" 11
St. Louis Clearing House.
March 3, 1903.
Franklin Bank.
(Perforated) Paid."

There is no pretense that Burton was in St. Louis when any of these checks was paid or that they were paid to him.

The only bit of testimony which shows or has any tendency to show what were the *legal relations* between the Riggs National Bank of Washington and the banks which were subsequent endorsers of these checks, is the statement by the witness Arthur T. Brice (Record, p. 107, bottom) that the check of January 22, 1903, was " sent direct to the National Bank of Commerce of St. Louis *for the credit of the Riggs National Bank.*" This is not inconsistent with the legal effect of the absolute endorsement of that check by the Riggs National Bank to the National Bank of Commerce in St. Louis. On the contrary this statement of the witness that this check was sent to the National Bank of Commerce of St. Louis " for the credit of the Riggs National Bank " indicates that the Riggs National Bank deposited this check in the National Bank of Commerce of St. Louis to the credit of the Riggs National Bank. This is in strict and full accord with the endorsement, for

it is in accordance with the ordinary course of procedure of one bank depositing a check in another bank for its credit that it shall make an absolute endorsement transferring the legal title.

The popular and ordinary way of speaking of such an endorsement and transfer of a check is that the holder of the check "deposits" it. Sometimes it is added that he deposits it to be collected or that he puts it in course of collection; but in law what he does is an absolute transfer of the title to the check, where the endorsements are absolute, as in the case of the four checks now in question; and the bank in which the check is deposited, by receiving the check and crediting the check on its books, becomes thereby the debtor to the bank or individual making the deposit. The depositor has parted with the title to the check and he has accepted the responsibility of the bank as his debtor.

It is not unusual for banking men and for the public generally to speak of a bank in a distant city in which an account is kept, as a "correspondent." It is also not unusual to speak of "collecting checks through their correspondents." These phrases "correspondents" and "collecting checks" are obviously not statements of any definite legal fact or of any definite legal relation. In order to ascertain what is the legal relation of the parties to negotiable paper, it is necessary to examine the negotiable paper itself and its endorsements, and all general talk of "correspondents" and "collecting checks through correspondents," such as stated by Arthur T. Brice, the witness who testified in regard to these checks, must be taken only as general expressions; and where, as in the case of these four checks, the facts as to their endorsement and payment are shown, these absolute endorsements and these facts as to the payment are in law the definite and controlling facts, especially as they are not inconsistent with the general understanding of what is generally meant when it is stated that checks are sent for collection through correspondents.

The Decisions of this Court and Other Courts Establish that on the Plain and Undisputed Facts of this Case, the Relation Between Burton and the Riggs Bank was that of Creditor and Debtor Immediately on the Deposit Being Made, and Credit Therefor Given to Burton, and not that of Principal and Agent, or Any Other Fiduciary Relation.

In the case of *Cragie vs. Hadley*, 99 N. Y., 131, Judge ANDREWS, giving the opinion of the Court of Appeals of New York (before RUGER, Chief Judge ANDREWS, RAPALLO, MILLER, EARL, DANFORTH and FINCH JJ., all concurring), said (page 133):

"The general doctrine that upon a deposit being made by a customer, in a bank, in the ordinary course of business, of money, or of drafts *or checks received and credited as money*, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question (*Commercial Bank of Albany v. Hughes*, 17 Wend., 94; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y., 530). The transaction in legal effect is a transfer of the money, or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts, or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business. The further rule that one who has been induced to part with his property by the fraud of another, under guise of a contract, may, upon discovery of the fraud, rescind the contract and reclaim the property, unless it has come to the possession of a *bona fide* holder, is equally well settled, and does not at all depend upon the character of the wrong-doer, whether a corporation or natural person."

That case of *Cragie vs. Hadley* came within "the further rule" stated by Judge ANDREWS, as above quoted, and hence the depositor was entitled to rescind the contract and reclaim the things deposited. This was the same principle stated by Mr. Chief Justice FULLER in the case of *St. Louis & San Francisco Railway Co. vs. Johnston*, 133 U. S., 566, 576, referred to *infra* (p. 140).

A case directly in point is that of *Metropolitan National Bank vs. Loyd*, 90 N. Y., 530 (before ANDREWS, C. J., RAPALLO, MILLER, EARL, DANFORTH, FINCH and TRACY, JJ., all concurring, except TRACY, J., absent). The facts and decision of the Court in that case, are as follows, being printed here in full, to wit:

"Appeal from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 19, 1881, which affirmed a judgment in favor of the plaintiff, entered upon the report of a referee (Reported below, 25 Hun, 101).

This was an action by the plaintiff as indorsee of a check for $305, dated New York, October 29, 1878, drawn by the defendant upon the Corn Exchange Bank, payable, for value, to the order of Edward F. Murray, and by him indorsed in blank and delivered to the Merchants and Mechanics' Bank in Troy, by whom it was transferred to the plaintiff.

The defendant set up by answer that the check was deposited by Murray in the Troy Bank for collection, that Murray, before payment of the check, gave notice to the Corn Exchange Bank not to pay the same, and it obeyed his directions, whereupon the defendant sent Murray $305 in payment of the check.

The issues were tried before a referee, and he, in addition to the facts already stated in regard to the inception and different transfers of the check, found that Murray kept an account with the Troy bank, and on the 30th day of October deposited the check with it; that the bank received it as a deposit of money, entered the amount as cash to the credit of Murray in his bank pass-book, and returned his pass-book to him; that on the same day the Troy bank mailed the check to the plaintiff, its correspondent in New York, and its creditor, to be credited on account of its indebtedness, and it was so credited; that on the next day the plaintiff caused payment of said check to be

demanded of the Corn Exchange Bank, who refused to comply, on the ground that payment had been stopped, and on the same day notice of presentment and protest was given to the defendant. As conclusion of law he found that upon the deposit of the check by Murray with the Troy bank, it became the owner of the check and debtor to Murray for its amount, thereby denying the allegation in the answer as to the purpose and effect of the deposit. He also found the other facts which, if this conclusion is correct, enable the plaintiff to maintain the action.

DANFORTH, J. The question turns upon the character of the transaction between Murray and the Troy bank, and although the appellant's case has been presented with more than usual ingenuity, we find no reason to doubt the correctness of the answer given to the question by the referee, and concurred in by the General Term, after an opinion by one of its learned judges (25 Hun 101), which so fully reviews the evidence and the authorities, that we should be content with simply expressing our concurrence, if the case had not been sent here by that court as involving a question of law which ought to be reviewed.

The argument of the learned counsel for the appellant assumes and starts from the very point in dispute —it rests on the assertion that the Troy bank became the depositary merely of the check, on condition that in case of non-payment it should be returned to Murray and the credit canceled, or, as it is also put, became the holder of the check as the agent of Murray for collection for his account. These propositions differ in form only, and in either shape are at variance with the finding of the referee. The latter must prevail. It is not disputed that Murray held the check as owner—it was his property to do with as he pleased. He had held other checks. Some of these he placed in the Troy bank for collection; others he deposited and took credit therefor as cash upon his pass-book. As to the first he could give and revoke his own directions as often as he chose, but as to the others *when they were by his direction credited to him, the title passed to the bank, and they were not again subject to his control.* This we understand to be the result of the general rule applicable to such transactions (*Scott v. Ocean Bank in City of New York*, 23 N. Y., 289; Story on Bailments, Sec. 88; *Keene v. Collier*, 1 Metc. [Ky.] 415; *Brahm v. Adkins*, 77 Ill., 263; *Chapman v. White*, 6 N. Y., 412; *Bank of the Republic v. Millard*, 10 Wall., 152; *In re Franklin*

Bank, 1 Paige, 254; *Clark v. Merchants' Bank*, 2 N. Y., 380).

"The check in question was of the last class. It is true no express agreement was made transferring the check for so much money, but it was delivered to the bank and accepted by it, and the bank gave Murray credit for the amount, and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed, and the right of Murray to command payment at once was of the very nature and essence of the transaction. On the other hand, the bank, as owner of the check, could confer a perfect title upon its transferee, and, therefore, when by its directions the plaintiff received and gave credit for it upon account, it became its owner and entitled to the money which it represented. The check, therefore, for every purpose material upon this inquiry as between these parties was money. But even if the check had remained in the hands of the Troy bank, Murray could not have reclaimed it. If, as the appellant insists, the check had been deposited for a specific purpose—for collection, the property would have remained in the depositor, but there is no evidence upon which such fact could be established, nor is it consistent with the dealings between the parties, or with any of the admitted circumstances.

These show that it was the intention of both parties to make the transfer of the check absolute, and not merely to enable the bank to receive the money upon it as Murray's agent. The appellant assumes the contrary; but the referee refused to find in accordance with the defendant's theory, and upon the evidence his refusal was well founded.

The cases cited by the appellant have been examined; most of them are considered in the opinion of the General Term, *supra*, and the others lend no support to his contention, except upon the theory, which we think untenable, that the check was deposited for a specific purpose, and not generally.

The appellant urges that the check was not delivered by Murray as the result of a negotiation or application for its discount or sale, or for a credit, and if we look for such negotiation in the words of the parties only, this must be conceded; but if we take the conduct of the parties during the transaction, it is otherwise. They adopted a mode of intercourse which

fulfilled the function of spoken words, and brought about a result as intelligibly as words could have done. Suppose Murray, handing the check to the cashier, said, "buy this," or "give me the money on this," or "discount it for me," and the cashier taking the check gave back at the same moment its amount, there would then have been the express agreement which the appellant thinks necessary, and no one would doubt that the title to the check and money changed from one to the other, that thereby Murray incurred a contingent liability to the bank as indorser of the check, and that he could again obtain it only by a new bargain. So if instead of giving the money the cashier had said "yes" to the application of Murray and Murray had replied, "place it to my credit," or had himself taken the money and deposited it, the result would have been the same. What was actually done by the parties amounted to this: Murray noted the check and its amount and also another check upon a deposit slip or memorandum in these words:

"Deposited in the Merchants' and Mechanics' Bank by Ed. F. Murray, Troy, October 30, 1878:

Check	$305
Check	9
	$314"

gave it with the checks to the cashier, and he entered the gross amount on the credit side in Murray's book as cash, and returned the book to him. He examined it at that time. The bank thereby charged itself with a debt absolutely due to Murray (*Commercial Bk. of Albany vs. Hughes*, 17 Wend., 94) and he held the promise or obligation of the bank available to himself from that moment.

Another point is made by the learned counsel for the appellant. Upon cross-examination of one of the officers of the Troy bank, it appeared that on the 31st day of October, after examination of its affairs by the bank superintendent, its business was suspended. The witness was then asked whether "before that examination it was known that a state of things existed that would justify an injunction—was it known in the bank that it was insolvent?" Upon objection made, the appellant offered to show that it was known to the bank that it was insolvent, and that being rejected, an exception was taken. This is now relied upon. It

should not prevail. There is no allegation in the answer that fraud was practiced by the bank upon Murray, or that in receiving the deposit and giving credit to him there was an intent to withhold the sum credited or that it was done in contemplation of insolvency. Moreover, it is plain that the bank continued, after the deposit, debtor to Murray by his own choice, and not by reason of its solicitation or act. He could have withdrawn the amount the moment credit was given, and, in not doing so, consulted his own pleasure or convenience. Whether such defense, therefore, would, under any circumstances, avail the defendant, it is not necessary to inquire. No ground is assigned by the learned counsel upon which any other exception taken for the appellant can be supported, and we discover none.

The judgment should be affirmed.

All concur, except TRACY, J., absent.

Judgment affirmed."

Decisions of This Court as to the Deposit of Checks and Receiving Credit Therefor.

In the case of *Bank of the Republic vs. Millard*, 10 Wall., 152, the question before the Court was, whether the holder of a check on a bank could maintain an action against the bank for refusing payment, in the absence of proof that it was accepted by the bank or charged against the drawer; and it was held that he could not. Mr. Justice DAVIS, giving the opinion of this Court, says (page 155):

" It is no longer an open question in this court, since the decision in the cases of *The Marine Bank v. The Fulton Bank*, 2 Wall., 252, and of *Thompson v. Riggs*, 5 Wall., 663, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by hon-

oring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a *legal one, and has nothing of the nature of a trust in it.* This subject was fully discussed by Lords COTTENHAM, BROUGHAM, LYNDHURST and CAMPBELL in the House of Lords, in the case of *Foley v. Hill*, 2 Clark and Finnelly, 28, and they all concurred in the opinion that the relation between a banker and a customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, *and does not partake of a fiduciary character*, and the great weight of American authority is to the same effect."

As the relation between the bank and a depositor is "*the ordinary relation of debtor and creditor*, and does not partake of a fiduciary character," the bank is *not the agent of the depositor.*

In *Thompson vs. Riggs*, 5 Wall., 663, the plaintiffs had made deposits with Riggs & Company, bankers, and it was shown that such deposits or some of them were made in gold and silver coin. The allegation of the declaration was (page 673)

" that the plaintiffs, on the twenty-eighth day of February, 1864, having a balance due them at the bank of the defendants, of five thousand seven hundred and sixty-one dollars, as deposits previously made there in gold and silver coin, demanded payment and return of the same, and that the defendants then and there refused to make such payment and return as they had promised to do."

One of the questions in the case was whether the plaintiffs were entitled to the return of gold and silver coin, and the further question (which was attempted to be raised, but which was held properly not before this Court, not being in a bill of exceptions), whether the payment could be made in legal tender notes. On the question whether or not the bank was entitled to the return of the identical money deposited, this Court said, Mr. Justice CLIFFORD giving the opinion (page 677) :

"4. Testimony of the teller of the bank is express to the point that the plaintiffs never made any special deposit with the defendants, and there is no testimony in the case to support any such theory. On the contrary, it is clear that they made their deposits for their own convenience, and were credited for the amount in the usual way on the books of the bank.

Clear inference from the whole testimony is that the deposits of the defendants were made without condition or special agreement of any kind, and in such cases the law is well settled that *the depositor parts with the title to his money, and loans it to the bank.*

Deposits may be made under circumstances where the legal conclusion would be that the title to the thing deposited remained with the depositor, and in that case the bank would become the bailee of the depositor, and the latter might rightfully demand the identical money deposited as his property.

Contracts between a banker and his customers are doubtless required to be performed, and must be construed in the same way as contracts between other parties. When the banker specially agrees to pay in bullion or in coin he must do so or answer in damages for its value, and so if one agrees to pay in depreciated paper, the tender of that paper is a good tender, and in default of payment the promisee can recover only its market and not its nominal value.

But where the deposit is general and there is no special agreement proved, the title of the money deposited, whatever it may be, passes to the bank, and the transaction is unaffected by the character of the money in which the deposit was made, and the bank becomes liable for the amount as a debt, which can only be discharged by such money as is by law a legal tender."

In the case of *Marine Bank vs. Fulton Bank*, 2 Wall., 252, in which case the deposit was clearly a deposit *for collection*, and then afterwards the money was collected and placed to the general credit of the depositor, Mr. Justice MILLER, giving the opinion of this Court, said (page 257):

"If we are correct in these views, it would seem that the relation of principal and agent was changed the moment the money received was placed in the gen-

eral fund of the bank, and the plaintiff credited on its book with the amount."

The facts in that case, unlike the facts in this case, showed that the things deposited were deposited "for collection," and not that there was, as in the present case, an absolute transfer of title to the bank and an immediate credit on the books of the bank; but in that case this Court held that, *as soon as the plaintiff was credited on the books of the bank*, the relation of debtor and creditor existed and the money became the general money of the bank.

In the case of *Phœnix Bank vs. Risley*, 111 U. S., 125, the facts were that at the outbreak of the Civil War the plaintiff in error, the Phœnix Bank, was the correspondent in New York of the Bank of Georgetown, in South Carolina, and that the Phœnix Bank was indebted to the Bank of Georgetown, as depositor, in the sum of about $12,000. May 20, 1861, the Bank of Georgetown sold and assigned to Risley, the defendant in error, $10,000 of such deposit. On the 4th of January, 1864, Risley demanded payment of the $10,000 from the Phœnix Bank. January 5, 1864, proceedings were commenced by the United States to confiscate the deposit. Those proceedings

(Page 127) "were directed against certain specific money, which was the property of the Georgetown Bank and which the Phœnix Bank held as a special deposit in the nature of a bailment, and not against the debt which the Phœnix Bank owed to the Georgetown Bank arising out of their relations as corresponding banks."

(Page 127) "Mr. Parker, the cashier of the Phœnix Bank, speaking of the time when the marshal served the monition in the confiscation case upon him, says that there were no specific funds, separate in kind, in the bank belonging to the Georgetown Bank, and only a general indebtedness in account for money or drafts remitted, which had been collected. 'It was a debt. No specific money or bills the property of the Georgetown Bank.'"

This Court, therefore, held (page 133):

"1st. That the specific money in the Phœnix Bank, against which the confiscation proceedings seem to have been directed, and which was condemned, was the money of that bank, and not of the Georgetown Bank, and the loss, if any, is the loss of the Phœnix Bank.

2nd. That no such seizure or attachment was made of the debt due by the Phœnix Bank to the Georgetown Bank, if any such debt existed, when the proceedings were commenced, as would give the District Court jurisdiction of that debt, and no action condemnation of that debt, or order on the Phœnix Bank to pay it, was made, which can constitute a defense to the present action.

3d. That the right of Risley to recover the debt as assignee of the Georgetown Bank remains unaffected by those proceedings."

In giving its opinion, this Court, speaking through Mr. Justice MILLER, said (page 127):

"That the relation of the Phœnix Bank and the Georgetown Bank was that of debtor and creditor *and nothing more*, has been the settled doctrine of this court, as it is believed to be of all others, since the case of the *Marine Bank v. The Fulton Bank*, 2 Wall., 252. In that case it was said that 'All deposits made with the bankers may be divided into two classes, namely, those in which the bank is bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to the banking business, in which the depositor, for his own convenience, parts with the title to his money and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount or any part thereof, on demand.' 'It would be a waste of time,' said the court, 'to prove that this latter was a debtor and creditor relation.' This proposition has been reaffirmed in *Thompson v. Riggs*, 5 Wall., 663; *Bank v. Millard*, 10 Wall., 152; *Oulton v. Savings Institution*, 17 Wall., 109; *Scammon v. Kimball*, 92 U. S., 362; and *Newcomb v. Wood*, 97 U. S., 581."

In *Scammon vs. Kimball, Assignee*, 93 U. S., 362, the facts were that an insurance company had become

bankrupt, and Kimball was the assignee in bankruptcy. Scammon was a private banker and the insurance company was a depositor with him. Scammon owed the insurance company for premiums due on the policies of insurance issued to him by said insurance company. The question in the case was whether the deposits of the insurance company with Scammon could be set off against the amounts due from Scammon to the insurance company as premiums on his policies, and the Court held that as these deposits were a debt, they could be set off against the moneys due for premiums on the insurance policies. This Court in giving its opinion said (page 369) :

" Deposits undoubtedly may be made with a banker under circumstances where the legal conclusion would be, that the title to the fund deposited remained in the depositor; and in that case the banker would become the bailee of the depositor, and the latter might rightfully demand the identical money deposited as his property ; but where the deposit is general, and there is no special agreement proved inconsistent with such a theory, the title to the money deposited, whatever it may be, passes to the banker, and he becomes liable for the amount as a debt which can only be discharged by a legal payment of the amount (*Thompson v. Riggs*, 5 Wall., 678 ; *Bank v. Wister*, 2 Pet., 325).

All deposits made with bankers, said Mr. Justice MILLER, may be divided into two classes; namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money, peculiar to banking business, in which the depositor for his own convenience parts with the title of his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand (*Marine Bank v. Fulton Bank*, 2 Wall., 256)."

" Money deposited with a banker, says Hill, creates a legal debt between the parties, which, under proper circumstances, may be recovered in an action at law. Hill on Trustees, 4th Am. ed, 173.

Authorities to the same effect are numerous and decisive; as, for example, it was expressly decided by the Master of the Rolls that money paid to a banker

becomes immediately a part of his general assets, and he is merely a debtor for the amount. *Devaynes v. Noble*, 1 Meriv., 561.

Sums which are paid, said Lord DENMAN, to the credit of a customer with a banker, though usually called deposits, are, in truth, loans by the customer to the banker; and the party who seeks to recover the balance of such an account must prove that the loan was in reality intended to be his, and that it was received as such. *Sims v. Bond*, 2 Barn. & Ad., 392.

Exactly the same rule was laid down in the Court of Exchequer, where it was held that money deposited with a banker by his customer, in the ordinary way, is money lent to the banker, with a superadded obligation that it is to be paid when demanded by a check. *Pott vs. Clegg*, 16 Mee. & Wels., 327."

In the case of an ordinary deposit with a bank, the word "deposit" is, legally speaking, a misnomer, as the above-quoted opinion points out, and what really takes place legally speaking is a "*loan by the customer to the banker.*" It might result in greater clearness of popular thought as to the relations between a bank and its customers if the words "deposit" and "depositors" were not used but some other words (if they could be found) which would express the legal relation. It is probably too late, however, to effect such a reform in terms; but this misuse of words cannot change the true legal relation.

The mischief of submitting to the jury the question whether or not the Riggs National Bank and the subsequent endorsees were agents of Senator Burton to collect the checks in question was the greater by reason of the fact that the use of this word "deposit" has frequently produced in the minds of laymen a misconception of the legal relation which exists between a depositor and a bank. As the matter was actually stated by the trial Court to the jury in the present case, it was practically left to the jury to guess whether as a matter of law the Riggs National Bank was or was not the agent of Burton. The result of such guessing on the part of laymen, especially with

the misuse, legally speaking, of the word "deposit," would not certainly be correct.

The 'Frisco Case, so Called in this Court, and Comments Thereon.

In the case of *St. Louis and San Francisco Railway Co. vs. Johnston*, 133 U. S., 566, the plaintiff, the St. Louis and San Francisco Railway Co., at its office in New York, drew a sight draft on the Atchison, Topeka and Santa Fe Railroad Co., at Boston, Mass., payable to the order of the Marine National Bank of New York, and deposited said draft in the Marine National Bank of New York (p. 567). The St. Louis and San Francisco Co.'s pass-book was at the time of the deposit in the possession of the bank, and remained in possession of the bank until some days afterwards, and (page 567) "no entry was made in it until some days afterwards, and then not by direction of the Railway Company."

(Page 568.) "The treasurer and assistant treasurer of the railway company testified that there was no arrangement or understanding, verbal or written, or dealing, to their knowledge, with the Marine Bank, by which the San Francisco Company was authorized or entitled to draw against out-of-town paper before collection, and that no drafts were ever so drawn; that they knew of no such agreement, verbal or in writing; that they drew on what they had and not on what they did not have; that the railway company had no occasion to draw against drafts or checks before collection, and did not do so; and that the company was allowed interest on its daily balances," &c.

There was, therefore, *no immediate credit on the pass-book of the depositor*, the St. Louis and San Francisco Railway Co., of the draft in question, and there was evidence showing, or tending to show, that under the course of business between the depositor, the St. Louis and San Francisco Railway Co., and the Marine National Bank, drafts such as the draft in question were taken *for collection*. On this showing, this Court,

Mr. Chief Justice FULLER giving the opinion, said (page 576):

"The question was one of fact rather than of law, and we think there should be something more in the evidence tending to establish that the San Francisco Company understood that the bank had become owner of the paper, than these mere credits for convenience, before that can be held to be the fact, notwithstanding it may be a recognized usage to allow a customer to draw. So far from there being shown an unequivocal course of dealing tending to support that conclusion, it seems to us the tendency of the evidence is otherwise."

There was another branch to this case, however, namely, that the complaint alleged and the facts showed that the Marine National Bank at the time it received the deposit was hopelessly insolvent, and that the president of the bank knew this fact; and hence this Court, speaking by Mr. Chief Justice FULLER, continued its opinion as follows (page 576):

"But if there could be any question on that branch of the case, we are unable to see that there could be on the other. This bank was hopelessly insolvent when the deposit was made, made so apparently by the operations of a firm of which the president of the bank was a member."

And the Court then goes on to hold that because of this fact the St. Louis and San Francisco Railway Co. would have a right to recover from the Receiver of the Marine National Bank the amount which had been collected by that bank on the said draft deposited by the St. Louis and San Francisco Railway Co.

This case of the *St. Louis and San Francisco Railway Co. vs. Johnston* does not at all support the ruling of the trial Court in the present case, as the Court below seems erroneously to have supposed (Rec., p. 102). On the contrary, this case is a decided authority against the ruling of the trial Court, for there is a necessary implication running all through the opinion of

this Court in the said case of the *St. Louis and San Francisco Railway Co. vs. Johnston*, that if that had been the case of an ordinary deposit of commercial paper under an absolute endorsement, and the bank had given immediate credit on the depositor's pass-book with the knowledge and assent of the depositor, that then the title of the commercial paper would have passed to the bank. The language of the Court on page 576 contains such necessary implication, for Mr. Chief Justice FULLER there says:

"The question was one of fact rather than of law, and we think there should be something more in the evidence tending to establish that the San Francisco Company understood that the bank had become *owner of the paper* than these mere credits for convenience, before that can be held to be the fact."

That is, referring to the facts in that case, that no entry was made on the pass-book of the San Francisco Company, and that that company did not know of certain entries which were made on the books of the Marine Bank, which the Court here refers to as "credits for convenience." All this necessarily implies that the Court was distinguishing the case then before it from the ordinary case where the commercial paper is deposited with the bank and immediate credit is given on the pass-book of the depositor, and the depositor is at liberty to draw immediately against such credit; all of which facts existed in the present case as to the four checks deposited with the Riggs National Bank.

The trial Court in the present case cited this case of *St. Louis and San Francisco Railway Co. vs. Johnston* in its ruling in relation to these checks, the entry in the record being as follows:

"That, I think, is a question of fact to be submitted to the jury; that, I think, is a settled law, as is determined by the case to which my attention was called, that of the Frisco Company against Johnston, 133 U. S."

This case of *St. Louis and San Francisco Railway Co. vs. Johnston* is not at all an authority for the proposition for which the trial Court cited it, namely, that it is *always a question for the jury* whether a bank acts as a collecting agent, or whether it receives commercial paper as an absolute deposit. What this Court in its opinion in the case of *St. Louis and San Francisco Railway Co. vs. Johnston* said was not that the question was one of fact *for the jury*, but that "the question is one of fact rather than of law," etc., as above quoted, which is a very different thing.

Not only so, but the question in that case of *St. Louis and San Francisco Railway Co. vs. Johnston* never was submitted to a jury. That case was a case in equity, and the trial Court (23 Blatchf., 489; 27 Fed. Rep., 243) held on the facts in the case that the title to the draft was in the Marine Bank; but when the case came before the Supreme Court of the United States, this Court held on the same facts that the title to the draft was not in the bank, and reversed the decree and remanded the case with instructions to enter a decree in favor of complainant, according to the prayer of the bill.

That case, therefore, did not involve any point, whether or not the question was a question to be submitted to the jury, and the trial Court in the present case was wholly in error when it said (Record, p. 102):

"That, I think, is a question of fact to be submitted to the jury; that I think is a settled law, as is determined by the case to which my attention was called, that of the Frisco Company against Johnston, 133 U. S."

Not only is this true, but there is *not one word of discussion, or any occasion for any discussion, by this Court in its opinion in said case of St. Louis & San Francisco Railway Co. vs. Johnston, as to what matters are questions for the jury and what matters are questions of law for the Court.* Nor is there the slightest statement or intimation, or implication of any kind whatsoever, in that case, that either in that case or in

any such case is there to be any exception to the general rule namely, that where the facts are simple and undisputed, the question on those facts is a question of law for the Court and is not a question of fact to be submitted to the jury.

By the clause "the question is one of fact rather than of law" we suppose the Court in that case meant to state that whatever question or difficulty there was in that case was to ascertain from the evidence whether or not the bank had in fact credited the depositor with the draft with the depositor's consent, and not that there was any difficulty in applying the rule of law to the case if there had been such a credit. No such difficulty is presented in the present case, because the facts are simple and undisputed that the checks were credited immediately on Se ator Burton's passbook, and credited with his consent. This present case is one of an ordinary deposit, where the checks were endorsed absolutely and were credited immediately on the depositor's passbook, with his consent, and with liberty to draw against them immediately—facts which did not exist in the case of *St. Louis & San Francisco Railway Co. vs. Johnston.*

Commercial Usage as to Checks and Credit Therefor.

THE IMPORTANCE OF THIS QUESTION AS TO WHO WAS THE OWNER OF THESE FOUR CHECKS IS VERY GREAT IN THE COMMERCIAL AFFAIRS OF THIS COUNTRY.

In the course of a year thousands of millions of dollars of checks go through the various banks of this country. A check may be drawn in San Francisco and travel to New York and back again and go through half a dozen banks or more. Any bank that had received this check with absolute endorsements in regular course, and had received it on deposit from one of

its depositors, whether such depositor was an individual or a bank in a distant city, would be very much surprised if he were told that such check did not belong to the bank, but that the bank was the agent of the payee named in the check, and that what the banks were doing was to collect it through a series of banks, each of which was agent of the payee named in the check.

Consider for a moment what would be the necessary legal effect if each bank, being subsequent endorsee of a check, as were the subsequent endorsees of the four checks in question, was regarded as a mere agent to collect that check. The first and most obvious effect would be that a bank is not the owner of the checks which it has in its vaults at the close of the day's business, but that it holds those checks as the agent for A, B, C and D all over the country, and that the money which will ultimately be paid on those checks belongs to A, B, C and D. If this were so, then, whenever a bank went into insolvency, all the checks and other commercial paper which it had on hand it would hold, not for *pro rata* distribution among its creditors, but it would hold one check as the agent of the original payee of the check, another check as the agent of the original payee of that check, another check as the agent of the original payee of that check, and so on.

There is no such absurd commercial law as that with respect to checks bearing absolute and unrestricted endorsements. On the contrary, the law is that when a bank takes the check *and credits the depositor* for the amount thereof, the bank thereby becomes liable as debtor to the depositor, and consequently the check belongs to the bank and is its own property, and in case of an insolvency all such checks which the bank then holds by absolute endorsements, and for which it has credited the depositor, are the bank's property, to be divided *pro rata* among its creditors.

We do not mean to state that a bank may not take a check or other item "for collection," or that it may not forward a draft or note merely to be collected; but

in such a case the bank does not, at least ordinarily, give credit on its books, but treats the matter of collection by entering up the item in its collection account, and crediting it only when it is paid.

The New York Clearing House several years ago, recognizing the desirability of having all checks and other negotiable paper which should be deposited with the New York banks and collected through the Clearing House, endorsed so as to confer an *absolute title* upon the bank with which they are deposited, and so on through all subsequent endorsees, adopted the following resolution (June 4, 1896), to wit:

"*Resolved:* That on and after the 1st day of July, 1896, members of this Association shall not send through the exchanges any checks, sight drafts, notes, bills of exchange or other items having thereon any qualified or restrictive endorsement, such as 'for collection' or 'for account of,' unless all endorsements thereon are guaranteed by the bank, member of the Association, sending such checks, drafts, notes, bills of exchange or other items. Any such items sent in violation of the above requirements shall be returned directly to the member from whom they were received, and shall in all respects be subject to the regulations contained in Section 15 of the Constitution of the New York Clearing House Association."

The above quoted rule has been in force ever since 1896 among the banks which are members of the New York Clearing House. The obvious purpose of the rule is to prevent any endorsement which would qualify the absolute title of the holder of the checks or other negotiable paper which should pass through the Clearing House, and to require that all endorsements should be, as were the endorsements of the four checks now in question in this case, absolute endorsements conferring absolute title upon the banks with which the checks should be deposited, and upon all subsequent holders.

Why this rule was adopted by the New York Clearing House cannot be better stated than by referring to the decision of this Court in the case of *Commercial*

Bank of Pennsylvania vs. Armstrong, 148 U. S., 50 (1892), in which Mr. Justice BREWER, giving the opinion of this Court, said (page 56):

"The Fidelity received the paper as agent, and the endorsement 'for collection' was notice that its possession was that of agent and not of owner. In *Sweeny v. Easter*, 1 Wall., 166, 173, in which there was an endorsement 'for collection,' Mr. Justice MILLER said: 'The words "for collection" evidently had a meaning. That meaning was intended to limit the effect which would have been given to the endorsement without them, and warned the party that, contrary to the purpose of a general or blank endorsement, this was not intended to transfer the ownership of the note or its proceeds.' And in *White v. National Bank*, 102 U. S., 658, 661, where the endorsement was 'for account,' the same Justice, speaking of the endorsement, said: 'It does not purport to transfer the title of the paper, or the ownership of the money when received.' The plaintiff, then, as principal, could unquestionably have controlled the paper at any time before its payment, and this control extended to such time as the money was received by its agent, the Fidelity."

The purpose of the making by the New York Clearing House Association of the rule above quoted was to prevent just these very endorsements—"*for collection*" and "*for account of*"—mentioned by Mr. Justice BREWER in his opinion above quoted, and to require a general and absolute endorsement in order, in the language of Mr. Justice MILLER above quoted, "to transfer the *ownership*" of the checks, notes and other commercial paper.

An instance of the endorsement of negotiable paper "for collection" is furnished in the case of *Evansville Bank vs. German-American Bank*, 155 U. S., 556, where this Court, Mr. Justice BREWER giving the opinion, said (page 562):

"It [The Fidelity Bank] received it as an agent, and the endorsement "For collection, for German-American National Bank of Peoria, Illinois," was notice to it and every subsequent holder that it was forwarded simply for collection."

B.

But even if the Riggs National Bank of Washington was the agent of Burton to collect the four checks (which we deny), yet the subsequent endorsees of said checks, if they were agents at all (which we deny), were the agents of the Riggs National Bank and were not the agents of Burton. Inasmuch, therefore, as such subsequent endorsees, to whom the money was paid in St. Louis, were not the agents of Burton, Burton was not present in St. Louis in the persons of such subsequent endorsees, and Burton did not receive any money in St. Louis on the said checks by any constructive presence through such subsequent endorsees as agents; for they were not his agents, but if agents at all, they were the agents of the Riggs National Bank.

The trial Court erroneously assumed (Record, p. 238, top), that if the Riggs National Bank was the agent of Burton to collect these four checks, then all subsequent endorsees were likewise the agents of Burton. In this the Court was clearly in error; and exception was taken to all this part of the charge (Record, p. 245).

On this point we need only cite the case of *Hoover vs. Wise*, 91 U. S., 308, in which this Court, Mr. Justice HUNT giving the opinion, after citing several cases, says (page 313):

"These cases show that where a bank, as a collection agency, receives a note for the purposes of collection, that its position is that of an independent contractor, and that the instruments employed by such bank in the business contemplated are its agents, and not the sub-agents of the owner of the note."

In the present case, as respects the four checks (if it is to be assumed, contrary to the fact, that the Riggs National Bank was the agent of Burton to collect these four checks), then the case as to the subsequent endorsees of the checks (if, contrary to the fact, they are to be regarded as agents of anybody as respects the collection of the checks), is no different from what it would have been if the Riggs National Bank had sent one of its clerks or messengers with the checks in person to St. Louis, with instructions to him to obtain the money on the checks and to bring the money itself back with him to Washington. In such case, the clerk or messenger would have been the agent of the Riggs National Bank and not the agent of Burton. So, likewise, if the subsequent endorsees of these four checks are to be treated as agents at all (which we deny) then they are the agents, not of Burton, but of the Riggs National Bank.

Hence Burton was not present in St. Louis when these checks were paid ; he was not there in person and he was not there constructively through any agent. Hence the Court clearly erred, on the undisputed facts in the case, in submitting to the jury the question whether or not the checks were collected by the Riggs National Bank or by any subsequent endorsees, as agents of Burton.

A similar decision was made by this Court in the case of *Exchange National Bank of Pittsburgh vs. Third National Bank of New York*, 112 U. S., 276, where the principles laid down in *Hoover vs. Wise* were reaffirmed, that case being cited and referred to on page 282, and again on page 287, and the Court laying down the principles which decided the case of *Exchange National Bank vs. Third National Bank*, on page 290, citing the English case of *Van Wart vs. Woolley*, 3 B. & C., 439.

In this case of *Exchange National Bank of Pittsburgh vs. Third National Bank of New York*, the Pittsburgh bank sent to the New York bank for collection certain drafts, and the New York bank, in turn,

sent them to a Newark bank, and this Court in said case held the New York bank liable to the Pittsburgh bank for the negligence of the Newark bank, said Newark bank being held to be not the agent of the Pittsburgh bank but the agent of the New York bank.

See, also, decision to same effect in *Tradesman's National Bank of Pittsburgh vs. Third National Bank of New York*, 112 U. S., 293.

Under this Point (III.) we maintain the following propositions:

1.

That the facts relating to the checks being stipulated and undisputed, the question whether the monthly compensation represented by those four checks which were received and transferred in Washington was a question of law *simpliciter*, and the Court erred in submitting its decision to the jury (Discussed in this brief, pp. 151-153).

2.

That on the stipulated and undisputed facts the Court ought to have held that the "compensation" represented by the checks was received by the defendant in Washington and not in St. Louis (Discussed in this brief, pp. 120 *et seq.*).

3.

The Court erred in its charge to the jury that the receipt of the money on the checks at St. Louis was the "gist of the offense," and that if the jury found that the Riggs Bank was not the "absolute owner" of the checks, a payment of the checks to its endorsee was in law a payment of the money to Burton himself in St. Louis, although he had parted with the checks and was not

present in St. Louis when the transferee under the Riggs Bank collected the money thereon (Discussed in this brief, pp. 153, 155–6).

4.

The Court erred in adopting and applying to the case the doctrine of imputed and constructive presence of the defendant in St. Louis by reason of the collection of the checks, in that city, if the jury found that the Riggs Bank was not the "absolute owner" of the checks (Discussed in this brief, pp. 165–170).

1.

On the stipulated facts (Stipulation 8th, Rec., pp. 97, 111), and on the undisputed evidence, the checks and their endorsements (Rec., pp. 102, 105, 112, 113), and the undisputed testimony of Government witness Brice (Rec., 105-109), cashier of the Riggs National Bank, Washington (who is the only witness on the subject), the Court erred as to the said checks (which are respectively the foundation of the 6th, 7th, 8th and 9th counts of the indictment) in the radical, fundamental and material particulars which we proceed to point out.

The facts being stipulated and undisputed, the question whether the monthly compensation or salary of $500 represented by the November, December, January and February checks were received by the defendant in Washington or in St. Louis is a question of law, pure and simple, as much so as if these facts had been found in a special verdict, and as such question of law ought to have been decided by the Court instead of being, as it was, "submitted, over defendant's objection, to the jury as a question of fact" (Record, pp. 102 ; charge of Court, Rec., 236, 237, 238 ; defendant's instructions 10 and 11 (p. 244) *refused).*

In this the Court abdicated its own constitutional duty of declaring the law arising upon the written in-

struments (the checks and their endorsements) and the stipulated and undisputed facts, and erroneously cast upon the jury the decision of the question of law thus arising.

Upon such stipulated and undisputed facts, the question of law thus arising *as to the place where the alleged offense was completed* upon which depended the jurisdiction of the Court in St. Louis was precisely this, viz., whether within the meaning of R. S., Section 1782, Burton as between him and the Rialto Company "received" his "compensation for services rendered," in Washington, where he received the checks, which checks he accepted, retained, transferred to the Riggs bank for value, and which checks were paid to transferees holding under the Riggs bank in St. Louis, or whether such compensation was not received by Burton until the money was actually paid on the checks to the transferees of the Riggs bank in St. Louis. On this proposition the Court should have said "yes" or "no," and not left its decision to the conjecture of the jury.

We show hereafter the reasons for the position that the Court should have ruled as to the compensation covered by the checks that such "compensation" was "received" by Burton in Washington. This point we do not stop to discuss in this place, our present point being that the Court erred in submitting the decision of the question of law arising upon the stipulated and undisputed facts to the jury.

We show hereafter that, as respects the jurisdiction of the Court, it is immaterial under the facts whether the Riggs bank was the mere agent of Burton to collect the money in St. Louis, or whether the Riggs bank became the absolute owner of the checks; but if such inquiry was, as the Court held it to be, the controlling question, then we insist that it was the duty of the *Court* to have decided this question and not to have left its decision to the guess of the jury; and this, too, without giving the jury any instructions whatever to guide the jury in making their decision.

There was no agreement between the Bank and Senator Burton as to the legal effect of his unqualified endorsement of the checks and receiving immediate credit therefor (Rec., p. 107) and, therefore, the Court had no basis or justification for its action in allowing the jury to find as a fact an "intention or understanding" as to the Riggs bank being a mere agent contrary to the necessary legal effect of the checks, their endorsement and the immediate credit given to the defendant therefor. There was no basis of fact for the finding by the jury of any "intention or understanding" outside of or contrary to the legal effect of the written instruments, their indorsement and the receiving by Burton of immediate credit therefor, and the verdict of the jury on counts 6, 7, 8 and 9 contrary to such legal effect is manifest error.

We submit and urge with confidence that the defendant's 10th and 11th instructions which the Court *refused*, stated the law correctly and the Court erred in refusing those instructions (Rec., p. 244).

2.

But if we are mistaken in the foregoing proposition that the Court ought to have decided the question as to whether the monthly payments represented by the checks were received by the defendant in Washington or in St. Louis, and if it was proper for the Court to submit this question to the jury, then the Court erred in its charge to the jury on this subject in the material particulars which we proceed to point out.

The Court said in its charge (p. 236):

"This suggests an important feature of the case, for the reason that unless it be true that the accused [Burton] received the money represented by and paid on this check at St. Louis, this Court would have no jurisdiction to try the case.

"The Constitution of the United States confers upon the accused in every criminal case the right to be tried by an impartial jury of a state and district wherein the crime shall have been committed.

"The receipt of the money is the gist of the crime charged against the accused, and if he did not receive it in this district, in fact in St. Louis where he is charged to have received it, he is not amenable to the law in this District, and cannot be convicted in this Court on this sixth count. Accordingly, it becomes your duty to ascertain and find from the evidence, what were the true relations between the accused and the Washington bank, when he deposited the check in question with that bank, and what was the understanding between them as to their respective rights in relation to the check and the proceeds thereof. On this question the Court charges you as follows (p. 237):

"If it was the intent and understanding of the Washington bank and the accused at the time the latter deposited the check in question with the former, that the bank should forward the same in the usual course by and through its correspondents to St. Louis, for payment, and that in so doing it, and its correspondents should act only as the agent of the accused for that purpose, then the final payment by the Commonwealth Trust Company at St. Louis, of the check to the correspondents of the Washington bank, *would amount in law to a payment in St. Louis as charged in the sixth count, of the amount of the check to the accused.* If, on the contrary, it was the understanding and intent of the Washington bank and the accused at the time the latter deposited the check in question with the former, that the bank should become the purchaser of the check, and should thereafter be *the absolute owner thereof*, and not act as just indicated, as the agent of the accused in the collection of the check, then the payment at St. Louis by the Commonwealth Trust Company, would amount in law to a payment to the Washington bank and not to the accused. In the latter event no crime would have been committed by the accused in this District, by reason of the check referred to in the sixth count of the indictment."

"In order to find the accused guilty on the sixth count, you must find from the evidence, by the same measure of proof as is required in all criminal cases, that the check referred to in the sixth count, was deposited by the accused in the Washington bank for collection, and that the bank was to act in collecting the same, as the agent of the accused, and not as the owner of the check in question" (p. 237).

On the next page (p. 238) the Court repeats the view that the final payment of the check in St. Louis would be in law a payment to Burton *at* St. Louis, unless the Riggs bank had "become the purchaser of the check and its *absolute* owner."

3.

The charge of the Court is erroneous in the following particulars:

(*a*) It makes the question whether the defendant "received" "compensation" in Washington or in St. Louis depend upon the actual receipt of "the *money* represented by the checks" (p. 236). "*The receipt of the money* is the gist of the crime charged against the accused" (p. 236), and the Court makes this question further depend (p. 237, top) upon "the true relations between the accused and the Washington bank when he [Burton] deposited the check in question with that bank, and upon the understanding between them as to their respective rights in relation to the check and the proceeds thereof," there being no understanding on this subject outside of the legal effect of what was done" (Rec., p. 107).

The question before the Court on the point of "compensation" to the defendant, represented by the four checks, was and is whether, as between the defendant and the Rialto Company, his employer, the defendant received the compensation represented by the checks in Washington or in St. Louis.

This question was and is one between the defendant and the Rialto Company, and it does not necessarily depend, as the Court stated to the jury (p. 237), upon "the true relations between the accused and the Washington bank," nor does it necessarily depend, as the Court held (pp. 236-7-8), upon whether Burton received the "*money* on the checks in St. Louis" or in Washington, nor upon the question whether the Riggs bank became the "*absolute* owner of the checks."

Under the constitution the case must be tried by an impartial jury of the State and district where the crime charged was committed.

Every act which the prosecution attempted unsuccessful to prove was an act done in the Post-office Department in Washington, the place named in the indictment, and not elsewhere. None are alleged to have been rendered in St. Louis nor was any attempt made to prove any services in St. Louis. If the compensation for the services rendered (even if they had been of the prohibited kind) was " received " by the defendant in Washington it is clear, and was so admitted by the Court (pp. 236, 237), that the Court had no jurisdiction over the offences charged in the 6th, 7th, 8th and 9th counts of the indictment, and upon which the defendant was found guilty and sentenced.

Compensation Represented by the Checks Was Received in Washington and not in St. Louis.

(*b*) We submit on this point the following propositions :

1. The defendant received his monthly salary as general attorney in negotiable checks sent to him by his request in that form to the City of Washington and there received by him. The defendant having accordingly received the checks in payment, and having indorsed and delivered them to the Riggs Bank and received credit therefor in Washington, and the checks having been duly honored when presented in St. Louis by transferees of the Riggs Bank, the defendant not being present in St. Louis, it necessarily follows that the defendant, as between him and his employer (the Rialto Company), received his compensation in the City of Washington.

There was never a moment's time after the defendant received and retained and thus disposed of the

checks when he could have maintained any action against his employer for the monthly salary represented by the checks, and this is a decisive test that the defendant's compensation for whatever services were represented by the checks was received by the defendant (as he had specially requested) in the City of Washington. If the checks had not been paid in St. Louis when presented the question might be different.

Under these circumstances the checks were a payment to the defendant when he received them at his request in Washington, or at all events as soon as he negotiated or disposed of them in Washington for value to the Riggs Bank. There was never a moment's time after such receipt and disposition of the checks by the defendant, when the defendant was entitled to the checks or their possession so as to tender or deliver them back to the Rialto Company, and never a moment's time when the defendant could have maintained an action against the Rialto Company, for the compensation represented by the several checks. And if the defendant after he parted with the checks and the title thereto could not have sued the Rialto Company for his services represented by the the checks (*ante*, pp. 128 *et seq.*, and cases), how can it be said that he had not received compensation for such services and received it in Washington? Nor could he have sued the bank in St. Louis.

The surrender by the defendant of the negotiable checks to the Rialto Company would be a *sine qua non* to the defendant's right to sue the Rialto Company for his compensation, and how can it then be said that the defendant had not received compensation from the Rialto Company when he had parted with the title to the checks (*ante*, pp. 133 *et seq.* and cases) and was not entitled to them or to their possession and was wholly disabled from surrendering them to the Rialto Company?

And, moreover, there never was a time after such endorsement and delivery of the checks to the Riggs

Bank in Washington and the stipulated credit received by Burton in Washington therefor when any one else but the Washington Bank or its indorsee or some subsequent indorsee was entitled to the possession of the checks or entitled (as against Burton) to collect the money on the checks, and when collected to hold it as its own, it having already paid Burton therefor. How then can it be said (as the Court allowed the jury to find) that the Riggs Bank was the mere agent of Burton to collect the checks, that the checks were Burton's property and that payment of the checks in St. Louis to a subsequent indorsee was in law a payment of money to Burton himself at St. Louis?

This view proceeds upon the theory that by the receipt by the defendant of the checks in Washington and their endorsement and delivery for value in Washington under circumstances wherein the defendant never again became entitled to the checks or to their possession, the defendant received the compensation represented by the checks from the Rialto Company in Washington and not in St. Louis. This view is fatal to the jurisdiction of the Court in St. Louis as respects the checks, and this irrespective of the question whether under the endorsement and delivery to the Riggs Bank and the giving of the defendant credit therefor, the Riggs Bank became the mere agent of Burton to collect or became the owner of the check. These are questions between the Riggs bank and its indorsees and not between Burton and the Rialto Company.

(*c*) But if the question of agency or ownership were material in this case, then under the stipulated and undisputed facts we make the following proposition, and we state it in the language of the defendant's 10th and 11th instructions which were *refused* by the Court (p. 244), who laid down the contrary to the jury in its charge.

The said 10th and 11th instructions asked by the defendant and *refused* (p. 244) are as follows:

"(10) If the checks of the Rialto Grain and Securities Company, described in the indictment, were sent to the defendant, and received by him in the City of Washington, D. C., and were by him deposited in the Riggs National Bank in Washington, and the bank gave him credit for the amount of such checks as the same were deposited respectively, and the defendant had the right at once to check against the same and to draw out such money from the bank and the bank sent the checks to St. Louis and presented them for payment, and they were paid, then the jury are instructed that the checks and the money thereon were received by the defendant in the City of Washington."

"(11) The jury are instructed, that after the defendant endorsed the checks in question to the Riggs National Bank of Washington, D. C., and had received credit, in his account with the bank for the amount of such checks, the checks became the property of the bank, and the bank had the right to do with the checks whatsoever it would, and it was under no obligation to account to the defendant for said checks or their proceeds."

The checks were negotiable paper payable on demand to Burton or order. They were endorsed in blank by Burton without any qualification or restriction and delivered to the Riggs Bank. The Riggs Bank gave Burton immediate credit for the amount, and the *title* to the check thus endorsed, delivered and paid for clearly passed to the bank, just as much as if the bank had delivered Burton over its counter bank bills for the amount. The Riggs Bank became in law a debtor to Burton for the amount, which Burton had the right to check out immediately. Such was the contract. The rights of Burton and the bank became irrevocably fixed when the check was thus endorsed and delivered to the bank and credit taken for it. The relation thus created was that of debtor and creditor, not that of agent and principal. (See authorities on this subject,

ante, pp. 128 *et seq.)*. The legal effect of the endorsement and credit irrevocably fixed the relations and rights of the parties. There is nothing in the proofs to control this legal effect even if parol evidence to that end were competent. But no such evidence was offered.

The endorsement and delivery of the checks to the Riggs Bank transferred to the bank the legal title to the checks. The giving of Burton credit with right to draw was the consideration for which the bank acquired the checks. That credit was availed of and never canceled and the right to cancel it never existed or arose. The bank had no power to cancel it except upon the single condition that the checks were subsequently dishonored. That event never happened. On the contrary the checks were duly paid on presentment.

Let it be noted that the right to cancel the credit in case of the dishonor of the checks was not a condition attaching to or qualifying the bank's title to the checks, not a *condition precedent* to the bank acquiring title, but it was a right *plus* the bank's title, a right collateral to such title and superadded to it, and not in any way in derogation of the bank's title to the checks.

When, therefore, payment of the checks which it had thus acquired was received the *money* so received was the money of the owner or holder of the checks and not Burton's. A decisive test of this is that if Burton had sued the Riggs bank for the money thus received on the checks, the action would have failed for want of title in Burton. How then can it be said the money received on the checks was Burton's money? The right of the bank in case of the dishonor of the checks to cancel the credit does not impair or qualify the title of the bank to the checks.

If it had paid Burton cash over its counter for the checks, and they were afterwards dishonored, the bank would have the right under the usage proved to charge Burton's account with the amount of the checks just

the same as it would have if it credited to Burton the amount of the checks. Burton's liability as endorser would have been sufficient for this.

It follows that every proposition laid down in the Court's charge as to these checks was erroneous.

Thus, the Court ought not to have charged that the jury might find that the Riggs bank was the *mere agent* of Burton, and, if so, the money paid on the checks was paid to Burton in St. Louis.

The Court also erred in charging that the jury might find that the checks were the property of Burton after the endorsement and transfer to the bank, and in allowing the jury to decide that unless they found that the bank was the "*absolute owner*" of the checks, then the checks belonged to Burton and the payment of the checks in St. Louis was in law the same as a payment to Burton in person in St. Louis.

The converse of these erroneous principles laid down by the Court in its charge was asserted in the 10th and 11th instructions asked by the defendant (p. 244). These were erroneously *refused* by the Court and exception duly taken.

4.

In respect of the checks and of the jurisdiction of the Court in St. Louis, we make the further distinct point that even if the Court rightly refused the 10th and 11th instructions asked by the defendant, and even if the Court did not err in submitting to the jury the question whether as respects the checks the Riggs bank was the mere agent of Burton to collect the same, or whether that bank became the absolute owner of the checks, and even if the jury were justified in finding that the Riggs bank was such agent, still the Court erred in its direction to the jury (p. 237) that

"then the final payment by the Commonwealth Trust Company at St. Louis of the check to the correspondents of the Washington (Riggs) bank, *would*

amount in law to a payment in St. Louis as charged in the 6th count, of the amount of the check to the accused; and that the issues with respect to the 7th, 8th and 9th counts are the same as the issue made by the 6th count with respect to the check therein involved" (pp. 237, 238).

The defendant asked the Court for instructions to return a verdict of not guilty as to counts 6, 7, 8 and 9, based on *the checks, which instructions* were refused and exceptions taken (p. 165, also p. 229).

These instructions ought to have been given, for it is plain and established law that where there is no proof of *venue* the Court should direct an acquittal. It was error to refuse them.

Stone vs. State, 105 Ala., 60.
Randolph vs. State, 100 Ala., 139.
Justice vs. State, 99 Ala., 180.
Childs vs. State, 55 Ala., 28.
Clark vs. State, 46 Ala., 307.

Under the Court's charge the jury rendered the following verdict (p. 24):

"We, the jury, find the defendant guilty as charged in counts one (1), two (2), six (6), seven (7), eight (8) and nine (9) of the indictment, and not guilty as charged in count three (3)"; counts four and five were *nolled.*

On this verdict the Court rendered judgment and sentence of fine and imprisonment (p. 25).

It is an immemorially established principle of the common law that an indictment can be found in that county only in which the crime has been committed.

Stephen, Dig. Law Crim. Proc., 47.
Rex vs. Jones, 6 C. & P., 137; 4 Black. Com., 303; 1 Chitty Crim. Law, 189; 2 Hale P. C., 163; 2 Hawk. P. C., Ch., 25, Secs. 24, 35, 51.

This common law principle as to the local jurisdiction in respect of criminal offenses was adopted by the Constitution of the United States, substituting "State" and "State and district" for county.

The Constitution of the United States provides that

" The trial of *all crimes*, except in cases of impeachment, shall be by jury; and such trial *shall* be held in the *State* where the said crimes shall have been committed, &c." (Const. U. S., Art. III., Sec. 2, Clause 3)[1]

But the Sixth Amendment to the Constitution is more specific, viz., that

" in all criminal prosecutions the trial shall be by an impartial jury of the *State and district* wherein the crime shall have been committed, which shall have been previously ascertained by law."[2]

Such " provisions are strictly construed in favor of the accused, and with a recognition of the principles

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[1]Commenting upon this section of the Constitution Mr Justice STORY says:

" It is observable that the trial of all crimes is not only to be by jury, but to be held in the *State*, where they are committed. The object of this clause is to secure the party accused from being dragged to a trial in some distant State, away from his friends and witnesses and neighborhood; and thus to be subjected to the verdict of mere strangers who may feel no common sympathy, or who may even cherish animosities or prejudices against him. Besides this, a trial in a distant state or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence."—Story's Commentaries on the Constitution, Vol. III., Ch. XXXVIII., Sec. 1775.

[2]Commenting on the clause of the Sixth Amendment Judge TUCKER says:

" The trial must not only be by a jury of the State, but of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law. This is intended to prevent the choice of a jury from a district provided by *ex post facto* legislation, and which might thus do a great injustice to the accused."

2 Tucker, Const. U. S., 678-680.

In Callan vs. Wilson, 127 U. S., 540, the provision that the trial of all crimes shall be by jury was held to mean not only felonies, but misdemeanors involving deprivation of liberty, and that these provisions are in force in the District of Columbia.

of the common law, and the Legislature cannot authorize a trial in any other place."

12 Cyclopædia of Law and Procedure, title Criminal Law, pp. 229, 230, and many cases there cited.

Congress has provided (Revised Statutes, Section 731) that

"When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein."

We have shown above that this Section 731 has no application to the present case, because not only were the defendant's alleged services wholly rendered in Washington, but the compensation represented by the checks was received by the defendant in Washington, and, therefore, if the facts showed any offense against Section 1782, Revised Statutes, upon which the indictment is founded, such offense was not only "begun" but was "completed" in Washington, and, if so, then under the Constitution the defendant could not be tried in St. Louis.

To support the jurisdiction of the court in St. Louis it is necessary to hold, as the Court below did hold, that the alleged offense was only *begun* in Washington, and that the same was not *completed* until the actual receipt of the *money* on the checks in St. Louis, and the Court charged the jury that payment to the correspondent of the Riggs Bank in St. Louis was the same in law as if the money had been paid to Burton in person in St. Louis, unless the Riggs Bank was the absolute owner of the checks.

We deny, on the express decisions of this and other Courts (cited *ante*, p. 128), the soundness of this proposition even on the assumption that the Riggs Bank or

its indorsee Riggs Bank was not the owner of the checks but was the agent of Burton to collect the checks.

In short, the Court held that although Burton was *actually absent* from St. Louis, yet he might be *constructively present* by reason of the payment of the *money* on the checks in St. Louis to the transferees of the Riggs Bank, and the Court also charged that in law the defendant was present in person in St. Louis when the money on the checks was paid, "if the Riggs Bank had not become the *absolute owner* of the checks," the Court erroneously leaving it to the jury to decide whether or not the Riggs Bank was such owner.

Further as to the Doctrine of Constructive Presence.

This doctrine of *imputed or constructive presence* in the alleged locality of the crime, although the accused was *in fact absent*, is, we insist, in direct conflict with the Constitution (Art. III., Sec. 1) and the Sixth Amendment securing to the defendant "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The ruling of the Court below (if it should be deemed correct in holding that the Riggs Bank and the subsequent indorsees were *agents* of Burton, which we deny) calls upon this Court to decide whether the odious doctrine of *constructive criminality* reprobated and stamped out in England has still a place in our system of law and jurisprudence; whether crime has a locality and a person accused has a right to be tried in the place where the acts constituting the alleged crime were committed; whether the offense charged against the defendant is *ambulatory* and is committed in Chicago, London, San Francisco or St. Louis, depending upon the accident where a particular draft or check is payable, or is paid, and whether it

can be committed in a distant jurisdiction through the fiction of an *imputed and constructive agency.*

Why did the Constitution erect the bulwark of personal liberty provided for in the Constitution and in the Sixth Amendment that every person accused of crime should enjoy the right of *trial* by a jury *in the State and district where the crime was committed?* It was because it was deemed essential to justice that no man ought to be triable or tried except in the place where the acts constituting the crime were actually committed; where the character of the prosecutor and of the accused as well as of the witnesses are known, and where the attendance of witnesses for his defense can be enforced. In a country of such vast geographical extent as ours, this established principle of the law of England as to the locality of crime and of criminal jurisdiction was considered of such prime and fundamental importance to the liberty of the citizen that it ought to be safe-guarded by the Constitution itself, and the people of this country were not satisfied until this great bulwark of justice and of individual right and liberty was further secured by the specific provisions of the Sixth Amendment to the Constitution.

Section 731, Rev. St., *supra*, is a transcript of the Act of 7 Geo., IV., c. 64, sec. 12, which provides that where an offense "is begun in one county and completed in another the offender may be tried in any of such counties, as for example, a wound in one county and death in another."

Stephen, Digest Crim. Procedure, p. 47 and note, citing R. vs. Jones, 1 Russell on Crimes, p. 8.

The statute on its face is limited to cases "where some of the acts material and essential to the crime and requisite to its consummation occur in one county and some in the other, in which case the accused is indictable in either."

12 Cycl. Law & Proc., *supra*, pp. 239, 240.

Under the Court's view the actual

"receipt of the *money* represented by the checks is the gist of the crime charged against the accused, and if he did not receive it in this district [St. Louis] he is not amenable to law in this district" (p. 236).

And thus the locality of the offense and of the Court's jurisdiction is made to depend upon the place where the *money* called for by the checks received in compensation for the alleged prohibited services is actually collected on the checks. Under this view the crime has no fixed locality or jurisdiction, but the offense is *ambulatory* or *peripatetic*. If the first check had been drawn on St. Louis, the second on Chicago, the third on New York, the fourth on Philadelphia, and each had been collected in those several cities, what would be the locality of the offense? Would the jurisdiction for trial be in each or all, or which?

Suppose the checks in question in this case had been drawn upon London or Montreal, and the *money* thereon collected in those places, then according to the Court's view there would be no completed crime at all against the laws of the United States, for the offense would not be one, which, in the language of Section 731 was "begun in one judicial circuit and completed in another."

The true view we submit is the one maintained above that the checks were received and disposed of by Burton in Washington, and that compensation was received when the checks were received by Burton as compensation, and disposed of by him to the Riggs Bank. On this point the authorities above cited are conclusive (*Ante*, pp. 128, 133).

THE DOCTRINE OF CONSTRUCTIVE PRESENCE underwent the most exhaustive examination to which it was ever subjected, by Chief Justice MARSHALL in the *United States vs. Aaron Burr*. It was the turning point of the case. It was discussed at the bar for days by law-

yers eminent for ability and learning as will be seen by Robertson's shorthand report of the trial. MARSHALL'S great opinion in that case has, so far as we know, never been questioned. It is given in full in *Robertson's Report;* also in the *Appendix* to 4 Cranch's Reports, and also in MARSHALL'S *Complete Constitutional Decisions* (by John M. Dillon, pp. 82–165).

The indictment charged Burr with treason, alleging as the overt act that he levied war on Blennerhassett's Island in the State of Virginia. The indictment was found and the trial took place in the United States Circuit Court for Virginia.

At the time of the assemblage of men on Blennerhassett's Island, Burr was two hundred miles distant in another Federal district and State. It was held that the indictment "could not be supported by proof that war was levied at that place (Blennerhassett's Island) by other persons, in the *absence* of the prisoner, even admitting those persons to be connected with him in one common treasonable conspiracy."

Chief Justice MARSHALL in his opinion says:

"The place in which a crime is committed is essential to an indictment, were it only to show the jurisdiction of the Court. It is also essential for the purpose of enabling the prisoner to make his defense. That at common law an indictment would have been defective which did not mention the place in which the crime was committed, can scarcely be doubted. For this it is sufficient to refer to Hawkins, V. 2, c. 25, § 84, and c. 23, § 91. This necessity is rendered the stronger by the constitutional provision that the offender 'shall be tried in the State and district wherein the crime shall have been committed,' and by the Act of Congress which requires that twelve petty jurors, at least, shall be summoned from the county where the offense was committed.

"A description of the particular manner in which the war was levied seems also essential, to enable the accused to make his defense. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice, the particular fact with which he is charged ought to be stated, and

stated in such a manner as to afford a reasonable certainty of the nature of the accusation, and the circumstances which will be adduced against him. * * *

"That clause in the Constitution, too, which says that in all criminal prosecutions the accused shall enjoy the right 'to be informed of the nature and cause of the accusation,' is considered as having a direct bearing on this point. It secures to him such information as will enable him to prepare for his defense. It seems, then, to be perfectly clear that it would not be sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified, by laying what is termed an overt act of levying war. The law relative to an appeal, as cited from Stamford, is strongly corroborative of this opinion. *If it be necessary to specify the charge in the indictment, it would seem to follow, irresistibly, that the charge must be proved as laid.*

"All the authorities which require an overt act require also that this overt act should be proved. The decision in Vaughan's case is particularly in point. *Might it be otherwise, the charge of an overt act would be a mischief instead of an advantage to the accused. It would lead him from the true cause and nature of the accusation, instead of informing him respecting it.*

"But it is contended on the part of the prosecution that, although the accused had never been with the party which assembled at Blennerhassett's Island, and was at the time at a great distance, and in a different State, he was yet legally present, and, therefore, may properly be charged in the indictment as being present in fact. It is, therefore, necessary to inquire whether *in this case the doctrine of constructive presence can apply.* * * *

"If such evidence would support such an indictment, by *the fiction that he was legally present, though really absent*, all would ask, To what purpose are those provisions in the Constitution which direct the place of trial and ordain that the accused shall be informed of the nature and cause of the accusation?" * * *

And because Burr was actually absent and could not under the circumstances be considered as constructively present the prosecution failed for want of jurisdiction in the Circuit Court for Virginia and Burr was acquitted.

We make, for the foregoing reasons, the distinct point that Section 731 of the Revised Statutes, as construed and applied by the Court below to the facts of this case against Senator Burton would make that section conflict with Article III., Section 2 of the Constitution and with the Sixth Amendment, which gives the defendant the *right* to be tried in the State or district in which the crime alleged against him was committed. The doctrine sanctioned and applied by the trial Court, that the defendant was *constructively present* in St. Louis though *actually absent*, and that therefore the offense was "completed" in St. Louis, and under Section 731, Revised Statutes, could be tried in St. Louis is, as thus applied, in violation of the above provisions of the Constitution in respect of the locality of the crime and the local jurisdiction of the Court before which the crime must be tried.

The common sense view of the case made on the trial of the defendant Burton, and the only one consistent with the Constitution and with sound legal principles is, we submit, the view that if the services rendered by Burton were prohibited services (which we have clearly shown they were not), and if the checks represented compensation for prohibited services (which we dispute), and if they were received therefor by Burton in Washington and endorsed and delivered, as shown to the Riggs Bank, then, under the Constitution of the United States (Art. III., Sec. 2), and the Sixth Amendment, the offenses based on the checks were committed, if at all, in Washington, and the Court in St. Louis had no jurisdiction over them.

Result as to the Checks Stated.

If as to the 6th, 7th, 8th and 9th counts based on the checks the Court in St. Louis had no jurisdiction, the result is that the judgment below must be wholly reversed for the following reasons:

1st. Because in this event the voluminous testimony offered by the government in respect of the transactions represented by these checks was incompetent and its admission (which was over the objections and exceptions of the defendant) was erroneous, and such testimony was necessarily prejudicial to the defendant. The defendant had the plain, legal right to have testimony relating to alleged offenses over which the Court had no jurisdiction excluded from the consideration of the jury. The "services" alleged to be represented by those checks the Court charged the jury they might consider, and they did consider the same in rendering their verdict.

2d. Because the judgment and sentence of the Court *was rendered upon and included punishment* for the offenses charged in the 6th, 7th, 8th and 9th counts—that is to say, for offenses over which the Court in St. Louis had no jurisdiction.

The record plainly shows that such punishment was included in the sentence of the Court, since the Court held throughout that the 1st and 2d counts (based upon the payment of $500 March 26) charged one offense, and counts 6, 7, 8 and 9 (based upon the checks) *each* charged a separate and distinct offense.

The Court so ruled on the *trial* on the motion of the defendant to compel "the prosecution to elect upon which counts it will further proceed" (pp. 165, 166). The Court refused this motion saying (p. 166):

"The receipt of $500 at one time for services, if they were rendered, before the P. O. Department would constitute *an offense in and of itself; so the receipt of another $500 would be an offense in and of itself.* That is the view I take of it.

JUDGE KRUM (for defendant): Then the view of the Court is that the counts which cover the receipt of the checks, and the proceeds of these checks *state separate and distinct offenses?*

THE COURT: Yes, I think so" (p. 167).

The same view was taken when counts 4 and 5 were *nolled* (pp. 22, 233).

Also when the Court directed the jury

" that if there was a verdict of guilty on the 1st or 2d counts there should be no conviction on the 3d count because, as already stated, it is but another way of charging *the same offense as is charged in the 1st and 2d counts*" (p. 235); which direction the jury followed in their verdict" (p. 24).

So, also, in the *charge* of the Court throughout. Thus the Court says:

" The 6th count relates to a transaction different from that involved in the first three counts" (p. 235).

So, also, the *verdict* (p. 24):

" We, the jury, find the defendant guilty as charged upon counts 1, 2, 6, 7, 8 and 9, and not guilty in count 3."

OBSERVE, that this verdict is not a general verdict, but specific as to each count.

So in the *judgment and sentence* of the Court (pp. 25, 26), in which it is stated that

" thereupon the said District Attorney asks the judgment and sentence of the Court upon the verdict of guilty heretofore returned by the jury to the charges *as contained in the 1st, 2d, 6th, 7th, 8th and 9th counts of the indictment herein*" (p. 25).

And the Court accordingly rendered judgment and sentence of fine and imprisonment upon the said verdict and all of the said counts *including the 6th, 7th, 8th and 9th counts upon the checks* (pp. 25, 26).

In view of the foregoing record, it is clear that the Court included in its sentence punishment for the four

" separate and distinct offenses," as it termed those represented by the four checks upon which the 6th, 7th, 8th and 9th counts were based. And it cannot be supposed that the Court would have imposed the same measure of punishment upon *one* offense as it would and did upon what it held to be *five* " separate and distinct " offenses.

It seems hardly necessary to observe that this is not a case where, upon a general verdict of guilty upon an indictment containing several counts stating the same offense in various forms, some of which counts are good and some bad, judgment may be pronounced upon or in proper cases referred to the good counts if the allegations therein are sustained by the evidence. On the contrary, this is a case where the verdict is *specific* and *not general* and where it *affirmatively appears* that the judgment and sentence pronounced by the Court were rendered upon *all* the counts, including those upon the checks, and where such judgment and sentence included punishment for the supposed " separate and distinct offenses " charged in the several counts based upon the checks, over which offenses the Court had no jurisdiction.

IV.

RE THE PAYMENT OF MARCH 26, 1903.

No services whatever were performed by Senator Burton before the Post Office Department for the month's salary which was handed to him in cash in St. Louis on or about March 26, 1903; and as two things are necessary to constitute an offense under the statute, namely, (1) services as well as (2) payment for the services, there was no evidence to go to the jury of any offense committed by Senator Burton in St. Louis or elsewhere, in respect of the said payment of March 26.

When the checks of December 15, January 22 and February 16, respectively, and also the payment of $500 on March 26th was offered to be proved, objection was made and exception taken by the defendant on the ground that, as respects said $500 payment in cash, there was no evidence at all of any services rendered by the defendant in the Post Office Department to which the receipt of such payment could be made applicable. (See as to check December 15, 1902, record, p. 103, 104; as to check January 22, 1903, record, p. 109; as to check of February 16, 1903, record, p. 112; and as to the $500 cash payment, record, p. 118.)

These objections and exceptions in respect of each of these checks and of this $500 payment were, respectively, overruled by the court, and the evidence of the giving of these checks and the payment of said $500 was admitted in evidence, notwithstanding there was an utter failure to prove the charge of the indictment—namely, that for these payments, respectively, Senator Burton rendered services to the Rialto Grain and Se-

curities Company before the Post Office Department to prevent the issue of a fraud order.

As the payments by the four checks were not made in St. Louis but in Washington, and as the prohibited services (if any prohibited services were performed, which we deny) were not performed in St. Louis but in Washington, the crimes alleged in receiving payment by these four checks and in performing the services for which it is alleged these four payments were made, were not either "begun" or "completed" in St. Louis, and therefore the trial court in St. Louis had no jurisdiction to entertain a criminal prosecution for the crimes alleged in receiving payment by these four checks and in performing the services for which the prosecution claims these four checks were compensation. Therefore the trial Court should not have considered or submitted to the jury any evidence as to these four checks or as to the alleged services for which these four checks were payment.

Senator Burton's contract of employment was that he should receive $500 per month for his services (Harlan's Testimony, Record, page 173; Burton's Testimony, Record, pages 215, 216). There was a proviso added to this contract at the suggestion of Senator Burton, in order that the employment might last long enough to make it worth while for him to take it up. Mr. Harlan states this in his testimony as follows (page 173):

"He [Senator Burton] said, 'Of course I do not want to get cut off at the end of one month.' 'For instance'—I am now using his language as near as I can—'I don't want to go down there to St. Louis and help you in the trial of that case [the Dennis indictment] should there be an indictment, and have my salary cut off at the end of that month.' So one or other of us—I do not remember which one of us—suggested five months. At any rate, whichever one of us suggested it, that was acceptable."

The contract was, therefore, that the compensation should be $500 a month, with the proviso that the employment should continue not less than five months.

Mr. Kastor in his testimony mentioned the sum of $2,500. He said (Record, page 81):

"I think there was something stated about $2,500 being paid to him."

"JUDGE CRUM: What is that? A. About the Senator receiving $2,500, and I think it was arranged to have it paid at different periods. That is not so clear in my mind."

Doubtless Mr. Kastor had in mind $2,500 because the employment was to continue not less than five months, which would make not less than $2,500. He states, however, that his recollection is "not so clear," and naturally it would not be, as Mr. Kastor was not a party to the contract and was not to pay the money or receive the money. But Mr. Harlan, who made the contract on behalf of Mr. Dennis and the Rialto Grain and Securities Company, and Senator Burton, both testified unequivocally that the compensation was to be $500 per month. This statement of the contract is made conclusive by Senator Burton's first letter, dated November 20, 1902, written when the conversation and agreement between him and Harlan were fresh in his mind (Record, p. 94): "You may make remittance *for my first month's pay*"; and by Harlan's letter to Burton, dated November 22, 1902, written also when the matter was fresh in Mr. Harlan's mind, in which he says (Record, page 175): "I enclose the company's check for $500 as per agreement. This check should have been sent in my former communication [letter of November 18, 1902, Record, page 91], but I neglected to do so." And again in Burton's letter to Harlan, dated February 11, 1903 (Record, p. 139), Burton mentions his next "*month's pay.*" This fact is further confirmed by the testimony of Mr. Mahaney, vice-president of the Rialto Grain and Securities Company, who was called as a witness on behalf of the United States (Record, page 132):

"Q. Your understanding was that he was on a salary of $500 a month, was it? A. Yes, sir, that is what I was told by Mr. Harlan."

The contract therefore was that the compensation was to be $500 per month and that the employment was to continue for at least five months.

Under this contract Burton received his "first month's pay" by check dated *November* 22, 1902 (Record, page 102), transmitted in letter of Harlan of same date (Record, page 175), the payments under the contract being made in advance, and this payment was for the month from November 18 to December 15 or 18, 1902. By mutual consent, the beginning of the period for the monthly payments was changed to the 15th of the month instead of the 18th (Harlan's Testimony, Record, pages 188, 189).

The next month's pay was made by check dated *December* 15, 1902 (Record, page 104), and this was for salary for the month beginning December 15 or December 18, 1902.

The next month's pay was made by check dated *January* 22, 1903 (Record, page 112), and this payment was for salary for the month beginning January 15 or January 18, 1903.

The next month's pay was made by check dated *February* 16, 1903, and was for salary for the month beginning February 15 or February 18, 1903.

The next month's pay was made in cash in St. Louis, and was made March 26, 1903, or thereabouts (see Cash Check, Record, page 117), and was *for the month beginning March 15 or March 18, 1903, and ending April 15 or April 18, 1903.*

If there were any prohibited services rendered by Burton (which we deny), these services were all of them rendered before February 27, 1903, the date of the last telegram between Mahaney and Burton (see Record, page 128; this Brief, page 112). The date of the last interview or communication which Senator Burton had with any official in the Post-office Department was February 5, 1903 (see Cochran's Testimony, Record, page 143; this Brief, page 74). There was absolutely no evidence whatsoever of any services rendered by Senator Burton to the Rialto Grain and Se-

curities Company or to Dennis before the Post-office Department, after February 27, 1903.

The check dated *November* 22, 1902, was the "month's pay" for the month's services beginning November 18, 1902, and ending December 18 or 15, 1902; the check dated *December* 15, 1902, was the "month's pay" for the month's services beginning December 15 or 18, 1902, and ending January 15 or 18, 1903; the check dated *January* 22, 1903, was the "month's pay" for the month's services beginning January 15 or 18, 1903, and ending February 15 or 18, 1903; the check dated *February* 16, 1903, was the "month's pay" for the month's services beginning February 15 or 18, 1903, and ending March 15 or 18, 1903; and the cash payment made in St. Louis on or about March 26, 1903, was the "month's pay" under the contract for the month's services beginning March 15 or 18, 1903, and ending April 15 or 18, 1903.

During this month, March 15 or 18, to April 15 or 18, 1903, for which the month's pay of $500 was made in cash to Senator Burton, no services whatsoever before the Post Office Department were performed by Senator Burton for the Rialto Grain and Securities Company, and there is absolutely no evidence whatsoever showing or tending to show any such services during that month, nor any such services whatsoever after February 27, 1903. On the contrary the evidence shows affirmatively that there were no such services.

There can be no doubt that each month's pay was for each month's services. Suppose, for example, that at the end of the second month's service, say January 15 or 18, 1903, Senator Burton had died; his executor could not for a moment maintain a claim that any further payment would be due; and if in such event the executor had sued for any subsequent month's pay, it would have been a complete answer to say that no services were rendered for the month for which the suit was brought. The contract was for $500 per month, that is, that Senator Burton should perform services

or be ready to perform and capable of performing services each month for the pay received for that month. Suppose Senator Burton had died March 1st, after all the alleged services before the Post Office Department had been performed, and suppose that on March 15 or 18, his executor had sued the Rialto Grain and Securities Company for compensation for the month from March 15 or 18 to April 15 or 18, and had set up in the complaint that Senator Burton in November, 1902, performed certain services for the Rialto Grain and Securities Company before the Post Office Department, and asked to have a judgment for the month's pay of $500 for the month beginning March 15 or 18, 1903, *as compensation for the services rendered in November*, 1902, a complete answer would be that those November services were paid for in the check dated November 22, 1902. The same thing would be true as to any services rendered in December, 1902, and January and February, 1903.

This shows conclusively that the $500 cash paid in St. Louis in March, 1903, was *not payment for any services rendered by Burton before the Post Office Department* (all of which were ended by February 27, 1903 at the latest), but that the $500 cash paid in St. Louis was the monthly salary paid under the contract for services which Burton performed or stood ready to perform for the Rialto Grain and Securities Company for the month beginning March 15 or 18, 1903. It was a month's pay due under the contract *for that month*, and was not payment for any services before the Post Office Department.

Government's Case Wholly Failed, and Court Should Have Directed a Verdict of Not Guilty.

There was, therefore, no evidence to go to the jury of any offense under the statute committed by Senator Burton. The payments by the four checks and all the

services for which those four checks were payment (even if any prohibited services were performed, which we deny), are all out of the case, because neither any such services were performed nor any such payments by the four checks were made in St. Louis; and, although the month's pay given to Senator Burton on or about March 26, 1903, was given to him in cash in St. Louis, there was no evidence to prove any services whatsoever by Burton before the Post-office Department in the month for which this payment was made, and, therefore, one of the two elements necessary to constitute an offense under Section 1782 of the Statutes is entirely wanting.

Hence, the Court erred in submitting the case to the jury at all, either as to the checks and services for which they respectively were payment or as to the payment made in cash in St. Louis, there being no prohibited services proved for which said cash was payment.

The first, second, third, fourth and fifth counts in the indictment are all based on the said payment made in St. Louis on the 26th day of March, 1903. Before the trial the fourth and fifth counts were *nolled* by the District Attorney with the consent of the Court (Record, pp. 22, 27 and 233). By direction of the Court a verdict of not guilty was rendered as to the third count, leaving standing, as respects the said payment of March 26, 1903, counts one and two (Record, p. 235).

At the close of the Government's case, the defendant asked that the following instructions be given to the jury—to wit : To return a verdict of not guilty as to Count One in the indictment ; to return a verdict of not guilty as to Count Two in the indictment ; to return a verdict of not guilty as to Count Three in the indictment. The Court granted the said motion as to Count Three, but refused the same as to Counts One and Two, to which ruling the defendant duly excepted at the time (Record, p. 165).

At the close of the testimony the defendant again

asked the Court as to each count in the indictment to direct the jury to return a verdict of not guilty, which the Court refused as to each of said counts, to which ruling the defendant then and there duly excepted (Record, p. 229).

The Court ought to have granted the said motions of the defendant as to said Counts One and Two, for the reason above fully stated, that there was no proof whatever that any services, of any character whatever, were rendered by Senator Burton in the department in respect of which the said payment of $500, March 26, 1903, was made. Furthermore, the evidence affirmatively showed that no such services were rendered by the defendant before the department (Record, pp. 221, 223.)

The Court also erred in its charge on this subject in instructing the jury (Record, pp. 234, bottom, and 235, top) that if the defendant received this $500 in St. Louis

" for services of the kind set forth in the counts [One and Two] *on any days between November 22, 1902, and March 26, 1903*, rendered by him for the Company before the Department in the matter of that inquiry [to-wit, whether a fraud order should issue], then it will be your duty to find the defendant guilty as charged in the First and Second counts of the indictment."

That is to say, under the doctrine of the Court's charge, if any prohibited services were rendered in *November, 1902*, for which payment had already been received by check for that month, and *for which the $500 cash was not payment*, still, under the Court's charge, the jury were bound to convict Senator Burton under Counts One and Two of the indictment.

V.

The Court Erred in Trying the Defendant, a Senator of the United States, When the Senate Was in Session, and Also in Pronouncing Judgment and Sentence of Fine and Imprisonment Against Him, To Be Executed at a time When the Senate Was in Session.

The Constitution of the United States provides, as respects the privilege of Congress, *inter alia*, as follows:

"They (the Senators and Representatives) shall in *all cases* except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."

Const., Art. I., Sec. 6

Mr. Justice STORY'S commentaries on this provision of the Constitution are given in the margin.[1]

The defendant was indicted January 23, 1904 (p. 19). The statute designates the alleged offense as a "misdemeanor." Without capias being served, the defendant appeared in court in person and by attorney January 27, 1904 (p. 19). The record shows that from the time of such appearance the defendant was under the *orders*

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[1] Story Com. Const. Book III., Ch. XII.

"§ 856. The next part of the clause regards the privilege of the members from arrest, except for crimes during their attendance at the sessions of Congress, and their going to or returning from them. This privilege is conceded by law to the humblest suitor and witness in a court of justice; and it would be strange, indeed, if it were denied to the highest functionaries of the State in the discharge of their public duties. It belongs to Congress in common with all other legislative bodies which exist, or have existed, in America since its first settlement under every variety of government; and it has immemorially constituted a privilege of both

of the Court which, if valid, restrained his freedom and power to perform his senatorial duties, the Senate being then in session (pp. 19, 20, 22–26).

The record does not show that the defendant set up his constitutional immunity from arrest or imprisonment until his motion in arrest of judgment March 29, 1904 (Rec., p. 278).

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houses of the British Parliament.[1] It seems absolutely indispensible for the just exercise of the legislative power in every nation purporting to possess a free constitution of government, and it cannot be surrendered without endangering the public liberties as well as the private independence of the members."[2]

"§ 857. This privilege from arrest, privileges them of course against all process, the disobedience to which is punishable by attachment of the person, such as a *subpœna ad respondendum, aut testificandum*, or a summons to serve on a jury; and (as has been justly observed) with reason, because a member has superior duties to perform in another place. **When a representative is withdrawn from his seat by a summons, the people, whom he represents, lose their voice in debate and vote, as they do in his voluntary absence. When a senator is withdrawn by summons, his State loses half its voice in debate and vote, as it does in his voluntary absence. The enormous disparity of the evil admits of no comparison.[3] The privilege, indeed, is deemed not merely the privilege of the member, or his constituents, but the privilege of the house also. And every man must at his peril take notice, who are the members of the house returned of record."**[4]

§ 860. **"The effect of this privilege is, that the arrest of the member is unlawful, and a trespass ab initio, for which he may maintain an action, or proceed against the aggressor by way of indictment. He may also be discharged by motion to a court of justice, or upon a writ of habeas corpus;[5] and the**

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[1] Black. Comm., 164, 165; Com. Dig. *Parliament*, D. 17; Jefferson's Manual, § 3, *Privilege; Benyon vs. Evelyn*, Sir O. Bridg. R., 334.

[2] 1 Kent Comm., Sect. 11, p. 221; *Bolton vs. Martin*, 1 Dall. R., 296; *Coffin vs. Coffin*, 4 Mass. R., 1.

[3] Jefferson's Manual, § 3.

[4] *Id.*, § 3.

[5] Jefferson's Manual, § 3, 2 Str., 990; 2 Wilson's R., 151; Cas. Temp. Hard., 28.

We make the following points:

1. That, as the defendant's immunity from arrest is not personal, but belongs to the office of Senator for the benefit of the Government, the State of Kansas and of his constituents, the de-

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arrest may also be punished, as a contempt of the house."[1]

§ 862. "The exception to the privilege is, that it shall not extend to 'treason, felony, or breach of the peace.' These words are the same as those in which the exception to the privilege of parliament is usually expressed at the common law, and it was doubtless borrowed from that source.[2] Now, as all crimes are offences against the peace, the phrase 'breach of the peace' would seem to extend to all indictable offences, as well those, which are, in fact, attended with force and violence, as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order.[3]

And so in truth it was decided in parliament, in case of a seditious libel, published by a member (Mr. Wilkes), against the opinion of Lord CAMDEN and the other judges of the Court of Common Pleas;[4] and, as it will probably now be thought, since the party spirit of those times has subsided, with entire good sense, and in furtherance of public justice.[5] It would be monstrous, that any member should protect himself from arrest, or punishment for a libel, often a crime of the deepest malignity and mischief, while he would be liable to arrest, for the pettiest assault, or the most insignificant breach of the peace."

Paterson, Liberty of the Subject, Vol. I., p. 193, refers to the later cases of Butt vs. Conant, 1 B. & B., 548, and Haylock vs. Sparke, and says: "That it must always be a question of fact whether a libel tends to a breach of the peace. The utmost length, therefore, that a court can fairly go is to hold that in some instances, according to the virulence of the libel, the libeller may be called on to give surety of the peace, but not necessarily so in all cases."

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[1] 1 Black. Comm., 164, 165, 166; Com. Dig., *Parliament*, D., 17; Jefferson's Manual, § 3.

[2] 4 Inst., 25; 1 Black. Comm., 165; Com. Dig., *Parliament*, D., 17;

[3] 1 Black. Comm., 166.

[4] *Rex v. Wilkes*, 2 Wilson's R., 151.

[5] See 1 Black. Comm., 166, 167.

fendant could not waive it, even if he had consented or attempted to do so. The record shows no such waiver in fact or in law, and the Court had no power to *try* the cause while the Senate was in session.

2. The defendant's supposed waiver, whatever its legal effect, could, in any event, extend no further than the period during which the defendant failed to set up his constitutional immunity, and after March 29, 1904, the Court had no power to pronounce the judgment and sentence of April 6, 1904 (p. 25), the Senate being then in session.

Before judgment the defendant set up this privilege by his motion in arrest made March 29, 1904 (p. 278), which was overruled April 6, 1904; and thereupon the Court proceeded to judgment and sentenced the defendant (the Senate being then in session) "to pay a fine to the United States of $2500, and to be immediately confined and imprisoned for and during the term of six months."

Record, pp. 25, 26.

The Court erred not only in *trying* the defendant but in pronouncing and proceeding to enforce immediate sentence of imprisonment, the Senate being in session; and should at least have suspended or deferred the said judgment or its execution until after the adjournment of the Senate. Our contention is that on the foregoing grounds the judgment below ought to be reversed.

THE PROCEEDINGS, JUDGMENT AND SENTENCE OF THE COURT PRESENT SEVERAL IMPORTANT QUESTIONS:

a.

The proceedings, judgment and sentence of the Court below involve "the construction or application of the Constitution of

the United States," within the meaning of the Judiciary Act of March 3, 1891, Section 5 (26 Stats., 826), giving in such cases a writ of error direct to this Court.

No *such* proceedings, judgment and sentence can, under the Constitutional provision (Art. 1, Sec. 6), be rendered against a Senator when the Senate is in session for a violation of Section 1782 Rev. St. (which section does not relate to or include "treason, felony or breach of the peace"), that does not necessarily involve the "construction *or* application" of said Article 1, Section 6, of the Constitution. The exercise by the Court of the power to try the defendant restrained him of his liberty and freedom to attend upon his duties as Senator.

The proceedings, judgment and sentence in this case involved both "the construction *and* application" of the constitutional provision to the case of the defendant. When Senator Burton was sentenced to six months in jail and to immediate confinement and delivered by order of the Court to the Marshal for the purpose of the execution of the sentence, the Court necessarily decided that it had the power to send him at once to jail, although such sentence inevitably deprived the Congress and his constituents and the State of Kansas of representation by him during the session of the Senate. Such a decision is, we maintain, in conflict with the objects and true meaning of the Constitutional provision in question, as we proceed to show.

b.

The trial, judgment and sentence of the Court below in this case are in conflict with the objects and true meaning of Article 1, Section 6 of the Constitution in respect of the immunity of Senator from arrest and

imprisonment during the session of the Senate.

It is among the ancient privileges of Parliament that its members are privileged from arrest when going to, attending upon or returning from Parliament for any less cause than "treason, felony or breach of the peace."

2 Paterson, Liberty of the Subject, pages 140–142, and cases defining "breach of the peace."

1 *Ib.*, 188, 189, 190, 191, 192, 193, as to what are the offenses for which surety of the peace may be required.

Paterson, on the pages above cited, clearly shows that the phrase "breach of the peace" refers to cases of threats of personal injury or violence or of imminent danger to the person or the public peace. It is clear that the words "treason, felony and breach of the peace" as used in the Constitution are not equivalent to *all* criminal offenses, else why did the Constitution not say so instead of specifying, defining and limiting the excepted offenses?

CONGRESS has provided for and regulated the power to "hold to security of the peace in cases arising under the Constitution and laws of the United States" (Rev. Stats. U. S., sec. 727).

"The only exceptions to the privilege of freedom from arrest," says May "which had ever been recognized by Parliament, were 'treason, felony, and breach of the peace,' 'or refusing to give surety of the peace'" (May, Const. Hist. II., Ch. VII. (4th Ed.), p. 3).

THE GROUND OR REASON OF THIS PRIVILEGE IS OBVIOUS. Stubbs states it thus:

"The privilege (of freedom from arrest) in regard to commitments by legal tribunals rests, on the *supreme necessity of attending to the business of Parliament, the King's highest Court*" (3 Stubbs, Const.

Hist., p. 536). "The privilege (of freedom from arrest) was in no case extended to treason, felony, or for security of the peace" (*Ib.*, p. 538).

Mr. Justice STORY states substantially the same reason, viz:

"Because the member has superior duties in another place."

See Com. on Const., Sec. 857, quoted *supra.*

"The privilege is deemed not merely the privilege of the member, or his constituents, but the privilege of the house also. And every man must at his peril take notice who are members of the house returned of record."

Story *ib. sup.*, Sec. 857.

So Judge COOLEY, who says:

"By common parliamentary law, the members of the legislature are privileged from arrest on civil process during the session of that body, and for a reasonable time before and after, to enable them to go to and return from the same. By the constitutions of some of the States this privilege has been enlarged, so as to exempt the persons of legislators from any service of civil process, and in others their estates are exempt from attachment for some prescribed period. For any arrest contrary to the parliamentary law or to these provisions, the house of which the person arrested is a member may give summary relief by ordering his discharge, and if the order is not complied with, by punishing the persons concerned in the arrest as for a contempt of its authority. The remedy of the member, however, is not confined to this mode of relief. **His privilege is not the privilege of the house merely, but of the people, and is conferred to enable him to discharge the trust confided to him by his constituents; and if the house neglect to interfere, the court from which the process issued should set it aside on the facts being presented, and any court or officer having authority to issue writs of habeas corpus may also inquire into the case, and release the party from the unlawful imprisonment."**

Cooley, Const. Lim. (6th Ed.), 160, 161. In the note Cooley says:

"The arrest is only voidable; and in general the party will waive the privilege unless he applies for discharge by motion or on *habeas corpus*. Tarlton v. Fisher, Doug., 671; Fletcher v. Baxter, 2 Aik., 224; Fox v. Wood, 1 Rawle, 143; Sperry v. Willard, 1 Wendell, 32; Wilmarth v. Burt, 7 Met., 257; Aldrich v. Aldrich, 8 Met., 102; Chase v. Fish, 16 Me., 132. But where the privilege is *given on public grounds*, or for the benefit of others, discharge may be obtained on the motion of any party concerned, or made by the court *sua sponte*."

Cooley, Const. Lim. (6 Ed.), p. 161.

So Mr. JEFFERSON. In his Parliamentary Manual, Sec. III., on the subject of *Privilege* he says:

"This privilege from arrest, privileges, of course, against all process the disobedience to which is punishable by an attachment of the person; as a *subpœna ad respondendum* or *testificandum*, or a summons on a jury; and with reason, because a member has superior duties to perform in another place. When a representative is withdrawn from his seat by summons, the 40,000 people [in Kansas many times the number] whom he represents lose their voice in debate and vote, as they do on his voluntary absence: when a senator is withdrawn by summons, his State loses half its voice in debate and vote, as it does on his voluntary absence. The enormous disparity of evil admits no comparison."

The Constitutional provision therefore rests upon the declared organic policy, that during the session of Congress the supreme matter is the public business of Congress, save only in the strictly excepted cases of "treason, felony or breach of the peace."

The foregoing authorities, as well as reason, establish the proposition that the Constitutional exemption is not personal to Senator Burton, but one which the Constitution attaches and attributes to the office of Senator in Congress, and the exemption from arrest

and imprisonment is intended not at all for the personal benefit of the Senator, but wholly for the benefit of the nation, of the Senator's constituents and of the State which he represents.

As the charge in the indictment against the defendant is neither treason, felony nor a breach of the peace, and as the Constitutional provision is based upon the ground that his duties to the State of Kansas and his constituents and the public as Senator are paramount duties during the time the Senate is in session, it follows that his constitutional right or immunity from arrest cannot be waived, for if it could be waived it would result that he might submit himself to the jurisdiction of the Court, whatever the Senate or the State might say or do, and if convicted he would be liable to be sentenced and imprisoned and thereby absolutely precluded from performing his constitutional duties to his State and his constituents and the nation; and this during the time when the Senate was in session, and in the face of the purpose of the constitutional exemption and privilege.

We therefore submit that it was not competent for the Court to try and sentence the defendant to imprisonment for the offense charged at a time when the Senate was in session. This would seem to be the case even if the defendant had not made his motion in arrest of judgment. Because of the indictment of the defendant as a Senator, and the fact of which the Court must take judicial notice that the Senate was in session, the action and judgment of the Court inevitably affected the constitutional right of a Senator and such right was necessarily involved in the case, and was shown on the record; and therefore on this writ of error the question is presented on the record: Whether it was competent under the Constitution for the Court to proceed in this case against the defendant, try and sentence him to imprisonment at a time when the Senate was in session?

It has been held in certain cases that the courts will not *ex officio* notice the privilege of persons who are members, but that such privilege must be brought to their attention by some proper motion or proceeding, as in Prentis vs. Commonwealth, 5 Rand. (Virginia), 697, where Prentis was presented in the Hustings Court for unlawful gaming, served with summons, and not appearing, judgment for $20 finewas entered against him. The defendant was, in fact, a member of the Legislature, and could have insisted on his privilege of exemption of process and arrest. He failed to do so. It was held that the Court was not obliged to notice the fact that the defendant was a member of the General Assembly. Other cases against members, such as slander, ejectment, &c., fall within the same rule.

THE PRINCIPLE DOES NOT APPLY TO THE CASE AT BAR, which is *sui generis* and peculiar. The indictment alleges that the defendant is and was a member of the Senate of the United States; and this is a criminal prosecution against him because he was such a member. The indictment alleges that his term as Senator would not expire till March 4, 1907. The indictment charged a "misdemeanor" and not treason, felony or breach of the peace, and, therefore, the charge alleged in the indictment brings the defendant on the face of the record within the immunity from arrest ordained in the Constitution. The Court was obliged to take judicial notice of the fact that the Senate was in session, and, therefore, all the facts appeared of record necessary to constitute the constitutional immunity from arrest during the session of the Senate. No fact *dehors* the record was necessary to bring the defendant's case within the constitutional privilege or exemption from arrest. The record gave the Court full notice of the defendant's constitutional immunity. In this aspect the case falls within the rule stated by Cooley, that the Court will in proper cases give the benefit of the exemption *sua sponte*. The plain duty of the Court,

we submit, was, under these circumstances, to keep its hands off the defendant while the Senate was in session.

THE RECORD shows the following facts as to the appearance of the defendant and the action of the Court:

On January 27th the defendant appeared in person in court and on motion of the District Attorney the Court *ordered* the defendant to be arraigned; and on application of the defendant the Court *ordered* that he be allowed to give bail for his appearance in the sum of ten thousand dollars on the 7th day of March and from time to time thereafter. On the 9th of February the Court *ordered*, the defendant not being stated to be present, that the cause be set for trial on March 22, 1904. On March 22d the defendant appeared in pursuance of his recognizance and went to trial. The defendant made no express waiver of any right. What the defendant in a criminal prosecution may or may not waive expressly or impliedly is so fully considered by this Court in the cases below referred to that we deem it unnecessary to do more than cite them.

Hopt vs. Utah, 110 U. S., 574, 579.
Thompson vs. Utah, 170 U. S., 343, 353.
Opinion of Mr. Justice HARLAN dissenting, in
Schick vs. United States, October Term, 1903.

Inasmuch as the exemption from arrest is not given to the defendant for his own benefit or advantage, but rests upon public grounds, it is against all principle to hold that in such a case as this he could waive the exemption, even if he had undertaken or attempted to do so.

We maintain, for the reasons above stated, that the Court erred in assuming to *try* the defendant when the Senate was in session, and that the defendant did not waive and could not waive the constitutional exemption and privilege, or if he could to any extent

waive such exemption and privilege such waiver did not and could not in any event extend beyond the time when he made his motion in arrest of judgment, asserting and claiming the benefit of such exemption and privilege. At the very least the Court should have deferred or suspended the judgment and sentence of imprisonment or its execution until the close of the then pending session of the Senate. Such is the view held by Parliament and the English Courts as shown by Stubbs and Jennings in the footnote.[1]

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[1] Stubbs Const. History of England, Vol. III., pp. 536 *et seq.* (Oxford Ed., 1880), from which the following extracts are taken :

" The recognition of the right, however ancient and full the admission may have been, was a very different thing from the power of enforcing it ; and the House of Commons seems to have had no means of doing this but by petition, or by obtaining a writ of *supersedeas*. Besides the case of Thorpe, already mentioned. the most prominent cases are those of William Lark in 1429,[1] and Walter Clerk, burgess of Chippenham, in 1460.[2] Lark was the servant of William Milrede, member for London, and had been arrested at the suit of Margery Janyns, committed to the Fleet prison by the Court of King's Bench, and there detained for damages. The Commons petitioned that in consideration of the privilege of members securing them against arrest, except for treason, felony, or breach of peace, Lark might be liberated during the session of parliament; and that the custom claimed for the Commons might be established by statute. The King rejected the last petition, *but ordered the release of Lark, securing to Margery her rights after the close of the session.*[3] In the case of Clerk, who had been arrested for a fine to the King and damages to two private suitors, and afterwards imprisoned and outlawed the Commons petitioned that the Chancellor might order his release by a writ to the Warden of the Fleet, saving the rights of the parties after the dissolution. This the King granted.[4] These, however, are only two out of a large number of like precedents. Another famous case occurred in 1477 ; that of John Atwyll, member for Exeter, against whom several writs of arrest had been obtained at the instance of a private litigant. The Commons petitioned that writs of *supersedeas* should be issued in

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[1] Rot. Parl. IV., 357.
[2] *Ibid.* V., 374.
[3] Hatsell, Precedents, I. 17–22.
[4] Hatsell, Precedents, I. 34–36.

THE CONCLUSION RESULTS that the only way to give effect to the paramount objects of the Constitution, and at the same time prevent the grave and serious conflicts between the judicial tribunals and the legislative department which have become memorable in

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each case, *saving the rights of the suitor after the close of the session.* In this case it is observed that, although the Commons claim a right to the suspension of the writ of execution, they do not insist on redress for the impleading of a member during the session as a breach of privilege.[1] The condition of affairs at the end of the reign of Edward IV. is thus stated: 'When a member or his servant has been imprisoned, the house of commons have never proceeded to deliver such person out of custody by virtue of their own authority; but, if the member has been in execution, have applied for an act of parliament to enable the chancellor to issue his writ for his release, or, if the party was confined only on mesne process, he has been delivered by his writ of privilege to which he was entitled at common law.[2]'

The privilege was in no case extended to imprisonment for treason, felony, or for security of the peace.

See, also, Jennings Anecdotal History of British Parliament, pages 404, 405, from which the following extracts are taken.

"DURATION OF THE IMMUNITY FROM ARREST.—A remarkable case concerning the freedom from arrest, was decided by Vice-Chancellor SIR CHARLES HALL in April, 1880. On March 24, the day on which Parliament was dissolved, a motion was made before the Vice-Chancellor to commit Mr. Fortescue Harrison, at that moment M. P. for Kilmarnock, for contempt of court in not complying with an order of the Chancery Division in regard to certain transactions in which he was concerned. Mr. Harrison's counsel raised the preliminary objection that as a Member of Parliament his client was privileged from arrest, and this objection was sustained by the Vice-Chancellor. Parliament was dissolved within a few hours of this decision, and the question then arose whether its privilege still protected Mr. Harrison. On the 15th of April this question was argued, and the Vice-Chancellor held that the period claimed by Parliament had been legally defined by the Court of Exchequer as a period of forty days before and after the meeting of Parliament. His Honor said it was clear time must be given for an ex-member to return home before his privilege expired.

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[1] Hatsell Precedents, i. 53.

[2] Stubbs Const. History of England, III., pp. 586 *et seq.*

the cases of Wilkes, Stockdale [1] and others, in England, is for this Court to hold that the judicial tribunals have no right to arrest or to detain for trial or to imprison a member of Congress (except in the specified

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Was this time indefinite and uncertain, or definite? An indefinite period would be very inconvenient, and that being so, having regard to the fact that the only case which mentioned any particular time, Duncombe's case, gave forty days as the term during which the privilege extended, he must hold that Mr. Harrison was still entitled to privilege, twenty-three only having expired since the dissolution. *The motion must, therefore, be refused, but that would not prevent the liquidator from again moving against Mr. Harrison when the full term had expired.*

COMMITTAL OF MEMBERS BY THE LAW COURTS.—Mr. Walley, member for Peterborough, having in 1874 been committed by the Lord Chief-Justice of the Queen's Bench (SIR A. COCKBURN) for contempt of Court and fined £250, a letter from the Chief-Justice to the Speaker, notifying the circumstances, was read to the House on the first meeting of the Parliament in that year, and, the explanation being accepted as satisfactory, the House declined to interfere. In a similar case in 1837, Mr. Lechmere Charlton having been committed, the House, "as sole and exclusive judge of its own privileges," claimed to be informed of the nature of the offense, and having received the information, a committe of privileges reported that Mr. Charlton's claim to be discharged ought not to be admitted. In another case, in 1831, Lord Chancellor BROUGHAM laid it down that a committal by order of the Court was "no violation of the privileges of Parliament if the members of Parliament have violated the rights and privileges of this Court, which is of as high a dominion and as undisputed a jurisdiction as the High Court of Parliament itself."

[1] See Yonge, Const. Hist., 370, 372.

See Autobiography of Lord CAMPBELL (Vol. II., p. 129), who says:

"The consequences (of the conflict between the House and Courts) would have been that, the sergeant-at-arms, even with the mace in his hand, would have been sent to Newgate by the Court of Queen's Bench. The House must have retaliated by committing the judges."

See, also, Lord CAMPBELL'S Great Speech on Parliamentary Privilege in Stockdale vs. Hansard, and his reference to the Supreme Court of the United States. Lord CAMPBELL'S Speeches, pp. 179, 180: Also, Life of Lord CAMPBELL (by Hardcastle) II., pp. 188–193; 3 May, Const. Hist., Chap. XI.

cases of "treason, felony or breach of the peace") while Congress is in session; or at the least to hold that if they have power to *try*, they have no power to *imprison* until the close of the session.

VI.

Erroneous Rulings of the Court on the Admission of Evidence.

Under this Point VI. we make this distinct proposition, namely, that even if there was any evidence to go to the jury, which we deny (see Point II., *supra*, page 52), yet in the course of the trial the Court made numerous erroneous rulings on the admission of evidence, prejudicial to the defendant, which require that the judgment be reversed.

The error of the trial Court in holding that if the defendant performed *any services whatsoever* before the Post-office Department for the Rialto Grain and Securities Company and received compensation therefor, he was guilty of an offense under Section 1782 of the Revised Statutes, runs all through the rulings of the Court on the admission of evidence and in its charge and instructions to the jury and in the additional charge. Under this erroneous view the trial Court repeatedly made erroneous rulings on the admission of evidence and permitted the prosecution to introduce a great mass of evidence—letters, telegrams, booklets, circulars, etc.—which did not prove or tend to prove the charge laid in the indictment, nor any other offense whatsoever by the defendant.

Under this heading we refer to the various rulings of the Court on the admission of evidence over the objection and exception of the defendant. The objections to such evidence are—

(1) that it is immaterial and irrelevant, and could only tend to confuse the issues in the case and prejudice the jury;

(2) that this evidence was not only received but was received on the theory, repeatedly stated by the Court, that if *any* service was rendered by the defendant for the Rialto Grain and Securities Company before the Post-office Department, such evidence would prove or tend to prove the defendant guilty, and the Court wholly failed to limit the evidence to be introduced to evidence which would prove or tend to prove that the defendant rendered services to prevent the issuance of a fraud order. See the statement and rulings of the Court on this point, quoted and referred to, this brief, pages

(3) Not only did the Court receive such evidence and permit it to be stated and read to the jury, but the Court wholly failed afterwards to withdraw any of this erroneously admitted evidence from the consideration of the jury, and, on the contrary, told the jury that they should consider *all* of the evidence which had been introduced.

The indictment charges that the defendant for compensation rendered services to the Rialto Grain and Securities Company before the Post-office Department in order to prevent the issuance of a fraud order. This is "the nature and cause of the accusation" against the defendant within the meaning of the Sixth Amendment to the Constitution, and this was the matter and offense and the only matter and offense which, either under the Sixth Amendment or under the general principles of law, could be tried by the Court in this case. Notwithstanding this limitation of the inquiry, the Court permitted the prosecution to introduce all sorts of evidence which did not prove or tend to prove the charge in the indictment.

A reading of the record in the present case shows a very curious and unusual course of proceedings in the introduction of evidence on behalf of the prosecution. If the defendant, as alleged in the indictment, performed services before the Post-office Department

to prevent the issuance of a fraud order, it would seem to be not a difficult thing at the beginning of the case to call the officers of the Post-office Department and have them testify directly as to what those services were, and then, if there were any letters, telegrams, or other documentary evidence, to introduce those in the appropriate place in connection with the services proved. This, however, was not the course pursued by the prosecution, but the prosecution introduced a great mass of evidence—letters, telegrams, booklets, &c., &c.—which did not prove or tend to prove the charge laid in the indictment, to wit, that the defendant for compensation rendered services to the Rialto Grain and Securities Company before the Post-office Department to prevent the issuance of a fraud order; and the prosecution wholly failed to prove that the defendant rendered any such services.

This is not an objection to the mere order of proof. The Court, of course, has a certain discretion as to the order in which it will permit proof to be made. With the exercise of that discretion we are not now finding fault, although objection was made on the trial because the order of proof tended to confuse the issues in the minds of the jury. What we are now complaining of is that the Court, after it had admitted this great mass of irrelevant evidence offered by the prosecution, over the objection and exception of the defendant, permitted all this irrelevant evidence to go to the jury, although the prosecution did not connect this evidence with the defendant so as to have it prove or tend to prove the charge in the indictment.

The *defendant* was on trial under the indictment, not for any acts which the Rialto Grain and Securities Company had done, but only for the defendant's own acts, and, so far as his own acts were concerned, only on the specific charge laid in the indictment. It was, therefore, wholly immaterial whether or not the Rialto Grain and Securities Company had been or had not been engaged in any wrong-doing, though, so far as the record in the present case indicates, that company was

not guilty of any wrong-doing. But the defendant was on trial and not the Rialto Grain and Securities Company.

On pages 167 and 168 of the record, notwithstanding our express willingness and desire to go into a full inquiry upon this subject to show that the Rialto Grain and Securities Company was doing an honest business, the Court again reiterates and clinches upon the other side his conclusion that no testimony of that sort was admissible, and that whether or not the Rialto Grain and Securities Company was carrying on an honest or a fraudulent business was immaterial (p. 168).

We submit, therefore, that the Court if it meant to exclude an inquiry into the business of the Rialto Company should have excluded on the defendant's objection any immaterial and irrelevant testimony being brought into the case discrediting such company and accusing it of fraudulent purposes. Senator Burton had accepted employment from this company, and the United States Attorney had industriously charged in the indictment that the Rialto Grain and Securities Company had devised a scheme to defraud. It appears ample room and verge enough was given by the Court to the government attorney to prove so far as convincing the mind of the jury was concerned, the fraudulent nature of the business of the Rialto Company by the introduction of these letters and the accompanying booklets.

Given these facts and the use that was made of them by the Government in its arguments to the jury, the additional simple fact of Senator Burton being employed at all and receiving compensation was enough to insure his conviction at the hands of a St. Louis jury at the time and under the peculiar environment of this trial; considering, of course, the ruling of the Court as to what constituted the elements of the offense and its further or additional charge to the jury, elsewhere referred to in this brief.

We proceed to consider the erroneous rulings of the Court on the admission of evidence.

THE HOUT AND EVANS LETTERS.

The prosecution offered and read in evidence, over the objection and exception of the defendant (Record, page 33), the letter of Bella Evans and the letter of Mrs. Hout (Record, page 34). The letters were objected to as follows (page 33):

"JUDGE KRUM: I object to the letters, first, because they are not competent, even as filed in the Post-Office Department, as creating a matter or thing in which the United States was interested directly or indirectly; secondly, that the matters are immaterial, because the only fact open to consideration upon the theory of the Government is the filing of them in the Department. What the letters themselves were or are is not material to any issue in this case."

The Court said (page 33):

"Of course it will be understood now that the truth of the statements in the letters may be entirely immaterial. The only question is whether the letters present something that would be matter of investigation, and therefore it may become necessary and proper to read the letters. But the truthfulness of the letters, as to whether they state the truth or not, is immaterial. The only material thing is whether they present the subject for investigation."

The prosecution thereupon read the letters to the jury (Record, page 34).

Consider for a moment what an impression these letters must have made when they were read to the jury. Obviously these letters would prejudice the jury against the Rialto Grain and Securities Company. That company was not on trial, but the defendant; and from one end of this trial to the other it was not shown by the prosecution that the defendant ever saw those letters. On the contrary it was shown that the

defendant never saw them (Record, pp. 146, 147). The reading of these letters could not have failed to prejudice the jury, not only against the Rialto Grain and Securities Company, but also against the defendant.

Furthermore, it developed later on by the testimony of the prosecution's own witness, Dice (Record, page 70), that

"his [Inspector Price's] report at that time [November 14, 1902, before the defendant was ever employed by the Rialto Grain and Securities Company] was to the effect that the two complaints [the complaints in the Hout and Evans letters] were not of such a character as to warrant action in the matter of the recommendation of a fraud order, or something of that kind".

The Court not only permitted these Hout and Evans letters to be read in evidence as against the defendant and over the objection and exception of the defendant, but when it was shown by the further evidence introduced in the cause that the matter of these complaints of Hout and Evans was ended by the Inspector's report, before Senator Burton was ever employed by the Rialto Grain and Securities Company, the Court did not remedy this error by withdrawing these letters or excluding them from the consideration of the jury, but on the contrary, instructed the jury to consider *all* the evidence which had been introduced.

THE ALLEN LETTER, THE LETTER OF THE RIALTO GRAIN AND SECURITIES COMPANY TO ALLEN, AND THE BOOKLET, "GOLDEN GAIN FROM GOLDEN GRAIN."

Over the objection and exception of the defendant (Record, pages 35, 36), the trial Court permitted the prosecution to introduce and read in evidence against the defendant the letter of Arthur M. Allen to the Postmaster-General (Record, page 36), the letter of the Rialto Grain and Securities Company to A. M. Allen (Record, page 37, 38), and also to put in evidence the booklet "Golden Gain from Golden Grain" (Record,

pages 38–50), the Court saying (Record, page 50), "*You may consider the book offered and refer to it if you wish.*"

The evidence in the case shows that the defendant never knew of this letter of Allen and this letter of the Rialto Grain and Securities Company, and the booklet accompanying the same, until after his indictment in the present case.

Cochran, Chief Inspector of the Post-Office Department, with whom alone Burton had any conversations, testified (Record, page 148) as follows:

"Q. What I want to get at is the fact whether or not these complaints, other than those of the two Albany women, were called to the attention of the Senator? A. My best judgment would be that they were not. I have no recollection of that.

Q. And that would cover the complaint of *Arthur M. Allen* of January 5, 1903, and S. A. Warner, that is, the Pittsfield lady, of January 21, 1903; those are are all that have been introduced here. That would cover all of those? A. Yes, sir."

Cochran also testified (Record, page 147):

"Q. It is a fact, isn't it, as you recall this occasion when Senator was advised of these two complaints, was the only one upon which he was advised of any complaints having been lodged against the company? A. That is my recollection of the matter."

The defendant Burton testified as follows (Record, page 220):

"I never heard that there was any complaint against the Rialto Grain & Securities Company until after I was indicted, except these two first that were mentioned to me on my first visit," *i. e.*, those of Hout and Evans.

The prosecution, therefore, utterly failed to connect Senator Burton in any way with this Allen letter and the Rialto Grain and Securities Company letter and the booklet "Golden Gain from Golden Grain;" and yet the Court permitted the introduction and reading of

these letters and a reference to this booklet, all of which could not but have prejudiced the jury against the defendant.

Furthermore, neither the Allen letter nor the Rialto Grain and Securities Company letter, nor this booklet, in any way prove or tend to prove the charge in the indictment, namely, that Senator Burton, for compensation, performed services before the Post-Office Department to prevent the issuance of a fraud order.

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this Allen letter, the Rialto Grain and Securities Company letter and the booklet "Golden Gain from Golden Grain," but, on the contrary, instructed the jury to consider *all* of the evidence which had been produced.

Warner Letter and Booklet "Giant Oaks From Tiny Acorns Grow."

Over the objection and exception of the defendant (Record, pp. 50, 51) the trial Court permitted the prosecution to introduce in evidence letter of Sarah A. Warner to the Postmaster-General (Record, p. 52), and the booklet entitled "Giant Oaks From Tiny Acorns Grow." The letter was read to the jury.

The Court committed the same error in admitting this Warner letter and booklet that it committed in the case of the Allen letter and the Rialto Grain and Securities Company letter and booklet "Golden Gain From Golden Grain," above mentioned. The testimony of the Chief Post-office Inspector, Cochran, above quoted (Brief, pp. 52, 55), as well as the testimony of Burton, above quoted, shows that Burton had absolutely no knowledge whatever of this Warner letter or booklet.

Neither this letter nor the booklet thus admitted in evidence prove or tend to prove the charge laid in the indictment, namely, that the defendant, for compensation, rendered services for the Rialto Grain and

Securities Company, before the Post-office Department, to prevent the issuance of a fraud order.

By reference to the letter it will be seen that it contains a most virulent attack on the Rialto Company by one who had no complaint to make against the Rialto Company whatever of any personal wrong done to her. This also is a matter the existence of which is not shown to have ever been brought to the attention of Senator Burton, but on the contrary it is shown affirmatively that he had no knowledge of the existence of the fact that any such letter had ever been written to or received by the department. The Court, as we have shown, allowed the introduction of these letters and booklets and authorized counsel to refer to them if they wished.

On page 51 of the record the following appears:

"JUDGE KRUM: I submit, if your Honor please, that the reading of these letters, will simply operate to drag into this case that which does not belong there at all.

THE COURT: It is not a question of good faith. The only question is whether it was pending before the Department in the form of inquiry, and perhaps I might say in answer to your objection that in the light of your argument before the jury it is proper for you to contend that this is a trifling matter, that only two complaints were before the department, or something to that effect.

JUDGE KRUM: Only two that were brought to the attention of the defendant at all.

THE COURT: Just enough to show that something was submitted to the Department, enough to put them upon inquiry.

MR. LEHMANN: We object because it is tending to create an issue which should not be made. The fact that the letter was received is the only thing that is competent.

THE COURT: If it was sent to the Department, it becomes necessary to show what it was. It might be inoffensive matter, something not involving or suggesting an inquiry. But it is the basis of a proceeding, again stating that it is not an issue in this case as to whether the Rialto Grain and Securities Company was in good faith carrying on business. The only question is whether a question was pending before the Depart-

ment. It is not necessary to read them any more than to call attention to them.

JUDGE KRUM: We make the same objection as before." Defendant excepted (p. 51).

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this Warner letter, and the booklet, "Giant Oaks from Tiny Acorns Grow," but on the contrary instructed the jury to consider *all* of the evidence which had been produced.

FRAVEL LETTER AND LETTER OF RIALTO GRAIN AND SECURITIES COMPANY TO FRAVEL.

Over the objection and exception of the defendant (Record, p. 53) the Court permitted the prosecution to introduce and read in evidence the letter of Fravel to the Postmaster-General (Record, p. 54), and the letter of the Rialto Grain and Securities Company to Fravel (Record, p. 55). The Court committed the same error in admitting these letters in evidence and permitting them to be read as was committed in the case of the Warner letter, Allen letter, and Rialto Grain and Securities Company letters and booklets above mentioned.

The evidence shows that the defendant never even knew of the existence of any of these (see Cochran's and Burton's testimony, this Brief, p. 84). These letters or booklets do not prove or have any tendency to prove the charge named in the indictment, namely, that the defendant for compensation rendered services for the Rialto Grain and Securities Company before the Post Office Department to prevent the issuance of a fraud order.

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this Fravel letter and the Rialto Grain and Securities Company letter, but, on the contrary, instructed the jury to consider *all* of the evidence which had been produced.

So-called "Jacket" Entries.

Over the objection and exception of the defendant (Record, p. 63) the Court permitted the prosecution to introduce and read in evidence the entries on the so-called "jacket" kept in the Post-office Department. The evidence failed to connect the defendant in any way with these entries, except in this, that on the first visit of the defendant to the Post-office Department, November 20, 1902, he was informed by Cochran of the existence of the Evans and Hout letters. But defendant did not even *know* that there was a "jacket" or what a "jacket" was until after his indictment (Record, p. 220). The defenndant stated this information in his letter of November 20 to Harlan (Record, p. 94) and Harlan in his letter of November 22 in reply (Record, p. 175) stated the fact (afterwards proved as the fact by the Government's own witness on the trial, Dice, p. 70, and Price, pp. 202–3), namely, that the Hout and Evans letters

"have been investigated by a Post Office Inspector connected with this Department, and he found the actions of our Company to be all right, and, we are informed, made a report in favor of our Company relative to the same."

The other matters and letters mentioned in this jacket the defendant knew nothing about until after his indictment.

This jacket did not prove or tend to prove the charge laid in the indictment, namely, that the defendant for compensation performed services for the Rialto Grain and Securities Company before the Post-office Department to prevent the issuance of a fraud order.

Moreover the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this "jacket" evidence, but on the contrary instructed the jury to consider *all* of the evidence which had been produced.

Burton Letter of November 20, 1902.

Over the objection and exception of the defendant (Record, pp. 93, 94), the Court permitted the prosecution to introduce and read in evidence the letter of the defendant to Harlan dated November 20, 1902 (Record, p. 94). This letter states the fact that the defendant had called at the Post Office Department, and had been informed of the existence of the complaints of Evans and Hout, and that those complaints had been sent out from the Post Office Department on the 7th of November, and that doubtless the inspector would call the attention of the Rialto Grain and Securities Company to them if he had not already done so. The defendant then states "I should like to be advised what there is in these complaints," etc. What took place on this visit of Senator Burton to the department on November 20, 1902, is fully stated under Point II., subdivision A of this brief, p. 54). The evidence there set forth at length, both of Post Office Inspector Cochran and the defendant, shows conclusively that the defendant did not on November 20 perform any services for the Rialto Grain and Securities Company before the Post Office Department in order to prevent the issuance of a fraud order.

The letter of November 20th does not prove or tend to prove the allegation of the indictment that the defendant for compensation performed services before the Post Office Department to prevent the issuance of a fraud order.

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this November 20 letter, but on the contrary, instructed the jury to consider *all* of the evidence which had been produced.

See also *ante*, p. 98, as to this letter of Nov. 20.

The McGowan Matter and Telegrams.

Over the objection and exception of the defendant (Record, pp. 123, 124, 125) the Court permitted the prosecution to introduce in evidence the telegram dated February 11, 1903, from Burton to Harlan (Record, p. 125) in regard to one McGowan, who made a claim against the Rialto Grain and Securities Company. The Court, admitting this telegram, said (Record, p. 124, bottom) :

" I cannot tell what the dispatch will show, but I assume some connection will be shown.
" Judge Krum : There is not a particle of connection.
" Col. Dyer : We will show the connection.
" Court : Of course, I cannot tell now."

There was an utter failure of the prosecution to show any connection whatever. The telegram was read in evidence (Record, p. 125), and, so far as it shows anything, it is that Senator Burton made inquiry in the Indian Department as to who McGowan was, and that was all.

Likewise over the objection and exception of the defendant (Record, p. 126), the Court permitted the prosecution to introduce the telegram of February 11, 1903, of Mahaney to Burton.

Neither of these telegrams proved or tended to prove the charge alleged in the indictment, namely, that the defendant for compensation rendered services to the Rialto Grain and Securities Company before the Post Office Department in order to prevent the issuance of a fraud order.

The Court plainly intended in the admission of this testimony to impress upon the jury his conviction that any visits to any of the Departments in Washington, whether such visits were with the purpose to prevent the issue of a fraud order in a particular matter, as set forth in the indictment, or not, were prohibited services within the terms of the indictment and were to be con-

sidered by the jury as tending to proof of defendant's guilt.

Moreover the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury these telegrams, but on the contrary instructed the jury to consider *all* of the evidence which had been produced.

See also Point II. *ante*, p. 111, as to this letter and telegram.

TELEGRAMS OF MAHANEY TO BURTON, FEBRUARY 25, AND BURTON TO MAHANEY, FEBRUARY 27.

Over the objection and exception of the defendant (Record, pp. 127, 128), the Court permitted the prosecution to introduce in evidence telegrams of Mahaney to Burton, dated February 25, and of Burton to Mahaney, dated February 27 (Record, p. 128). As against the objection of the defendant the Court said (page 127):

"Inasmuch as the indictment does not indicate any details, but the general statement, any of this testimony which tends to show *services* were rendered before the Department is competent."

Note this statement of the Court, "any of this testimony which shows services were rendered before the Department is competent;" not any of this testimony which shows *services to prevent the issuance of a fraud order*, the offense and the only offense alleged in the indictment, but the Court under this ruling and under other similar rulings let in testimony of any and all things that the defendant did before the department, without any regard whatever to whether the evidence tended to show that the defendant performed services to prevent the issuance of a fraud order or not.

Neither the telegram of Mahaney nor the reply of Burton proved or tended to prove the charge laid in the indictment, namely, that the defendant for compensation performed services for the Rialto Grain and

Securities Company before the Post-office Department in order to prevent the issuance of a fraud order.

The telegram of Burton of February 27th, so far from proving the performance of any services, states that "there is no complaint in the Department against you," and, therefore, there was nothing in respect of which to perform services.

Moreover the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury these telegrams, but on the contrary, instructed the jury to consider *all* of the evidence which had been produced.

See also Point II. *ante*, p. 112, as to these telegrams.

TELEGRAM OF MAHANEY TO BURTON, FEBRUARY 14, 1903.

Over the objection and exception of the defendant (Record, p. 129) the Court permitted the prosecution to introduce and read in evidence the telegram of Mahaney to Burton, dated February 14, 1903. This telegram shows on its face that it had to do only with the State Investigating Committee, and had absolutely nothing to do with the United States or the Post Office Department.

This telegram did not prove or tend to prove in any way the charge made in the indictment—namely, that the defendant for compensation rendered services for the Rialto Grain and Securities Company before the Post Office Department to prevent the issuance of a fraud order.

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this telegram, but on the contrary instructed to jury to consider *all* of the evidence which had been produced.

Letter of Harlan Dated December 2, 1902; Letter of Burton Dated December 9, 1902, and Letter of Harlan to Burton Dated December, 3, 1902.

Over the objection and exception of the defendant (Record, p. 134) the Court permitted the prosecution to introduce and read in evidence letter of Harlan to Burton dated December 2, 1902, and letter of Burton to Harlan dated December 9, 1902 (Record, pp. 135–137). The letter of Harlan dated December 2, 1902, relates to the indictment of Dennis and the preparation of that case. The letter of Harlan to Burton dated December 3, 1902, relates to Bowman and Shove. The letter of Burton to Harlan dated December 9, 1903, is in answer to the said letter of Harlan of December 3 in regard to Bowman and Shove, and in regard to the Dennis case (see as to these three letters this brief, pp. 101–104).

None of these three letters proves or tends to prove the charge laid in the indictment, namely, that the defendant for compensation rendered services for the Rialto Grain and Securities Company before the Post Office Department to prevent the issuance of a fraud order.

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury these three letters, but, on the contrary, instructed the jury to consider all of the evidence which had been produced.

See *ante*, p. 101 *et seq.*, as to these letters.

Burton's Letter of February 11, 1903.

Over the objection and exception of the defendant (Record, p. 138), the Court permitted the prosecution to introduce and read in evidence letter of Burton to Harlan, dated February 11, 1903 (Record, p. 139).

This letter did not prove or tend to prove the charge laid in the indictment—namely, that the defendant,

for compensation, performed services for the Rialto Grain and Securities Company before the Post-office Department to prevent the issuance of a fraud order, but the letter related entirely to another matter.

Counsel for the prosecution attempted to seize hold of general expressions in letters passing to and from Burton, to prove the allegations of the indictment. The danger of perverting any general expression in a letter is well illustrated in the case of this letter of Burton, dated February 11th. He says, addressing Harlan: "I have your telegram telling me that things were satisfactory between you and Dice. I hope you are not letting him mislead you in any way." How easy for the prosecution to jump at the conclusion that this refers to the question of the issuance of a fraud order! But it does not refer to any such thing. So also this: "Be sure and keep me advised if there is anything to do at this end of the line before going away. I have tried to keep the Department in a good humor with Major Dennis, and think I have succeeded." How easy to jump at the conclusion that this also refers to the question of the issuance of a fraud order! The fact is clearly otherwise. The defendant had had two conferences with Mr. Cochran, January 24 and February 5 (see this Brief, p. 106), in order to have the department direct Mr. Dice to turn over to the Rialto Grain and Securities Company the books of the Brooks Brokerage Company. At the interview on February 5th, according to Mr. Cochran's testimony (p. 143):

"The senator either showed or read me a telegram from Mr. Harlan, stating that they had not got possession of this book or books, and that Col. Dyer stated he had no further use for them, and the Senator again said that if that was the case, they ought to be returned, that *Mr. Dice was acting in bad faith* in insisting upon keeping the books. I promised to send a telegram of inquiry the next morning, and I did send one."

Judge KRUM stated when this telegram of February 11 was offered (page 138):

"It relates to an effort to have Mr. Dice, who had in his possession the books of the Brooks Brokerage Company, turn them over to Mr. Dennis after the trial of the Dennis case."

Bearing these things in mind, let us read the letter of February 11, and it is clear that it refers only to the books of the Brooks Brokerage Company. The Court, however, permitted this letter to be read in evidence to the jury without showing any connection between this letter and any question of the issuance of a fraud order, and the Court said, page 138:

"I will say again, so there may be no misunderstanding as to the view the court has in admitting this testimony, that the letters, telegrams—this letter among others—are admitted to go to the jury, to show the relations existing between the defendant in this case and the Rialto Grain and Securities Company, with the view of aiding the jury in the determination of the situation which was stated by counsel in their opening, as to what his true relation was. *Whether* his relation was aiding, assisting and rendering services *before the department* or whether his relation *was entirely exclusive of that;* and for the purpose of acting as general counsel upon the situation. That is the sole ground upon which this letter, and other letters, have been admitted. As to this letter, inasmuch as it bears upon his relations to the Company, and his services rendered, that objection is overruled."

"To which ruling by the court the defendant, by his counsel, then and there duly excepted."

Note the language of the Court, which is the keynote of the Court's rulings on all this evidence, and subsequently in his charge and additional charge, namely,

"whether his [defendant's] relation was aiding, assisting and rendering services *before the Department*, or whether the relation was *entirely* exclusive of that, and for the purpose of acting as General Counsel upon the situation."

In other words, in the view of the Court, there were only two kinds of services—one "*before the depart-*

ment," which was prohibited by Section 1782 of the Statute, and the other "*entirely exclusive of that,*" which was not prohibited. The Court did not discriminate between the services rendered for the purpose of preventing the issuance of a fraud order and services rendered for any other purpose, but permitted evidence to be introduced of *all* services of *all kinds* whatsoever before the department.

Moreover, the Court never corrected or attempted to correct this error by withdrawing from the consideration of the jury this letter of February 11th ; but, on the contrary, instructed the jury to consider *all* of the evidence which had been produced.

See Point II. *ante*, p. 111, as to this letter.

The Trial Court Did Not by its Charge and Instructions to the Jury Cure the Error which it Made in the Admission of Improper Evidence ; But, on the Contrary, Confirmed Such Error.

While the Court might permit improper evidence to be introduced for the time being in the expectation that the prosecution would introduce further evidence to make the improper evidence material and proper, and while the Court might, if such further evidence was not forthcoming, by its instructions, charge the jury to disregard and to consider as out of the case any such improper evidence, yet that is not what the trial Court did in the present case. After the trial Court had permitted all this improper evidence to be introduced and to go before the jury, the trial Court in its charge and instructions to the jury did not withdraw any of this evidence from their consideration ; but, on the contrary, said (Record, page 239) :

" In determining each and all the other issues of this case, you should also consider *all* the evidence, facts and circumstances in evidence, as well as all fair and reasonable inferences which may be drawn therefrom."

In other words, the Court not only permitted but instructed the jury to consider "*all* the evidence, facts and circumstances in evidence." Nowhere in the charge does the Court exclude from their consideration any improper evidence which was admitted.

VII.

ERRORS IN ADDITIONAL CHARGE AND ORIGINAL CHARGE.

The trial Court erred in its additional charge to the jury after they had come back for further instructions (Rec., pp. 246–252), **as well as in its original charge and instructions.**

The errors of the Court under this heading are of two kinds: *First*, in its instructions on propositions of law, and also in depriving the defendant of his constitutional right to have the question of his *guilt of the charge laid in the indictment* tried and decided by the jury; and *Second*, in coercing the jury into rendering a verdict of guilty.

FIRST. ERRORS IN INSTRUCTIONS ON PROPOSITIONS OF LAW.

Preliminary to the discussion of the questions of law arising under the ADDITIONAL CHARGE of the Court (Rec., pp. 246–252), it is important to fix in the mind the exact charge in the indictment.

It goes without saying that an indictment in general terms that the defendant for compensation rendered services before the Post-office Department in a matter in which the United States was interested, without specification would not be sufficient. So an averment that the defendant for compensation endeavored to

prevent the issue of a "fraud order" without an averment that the question whether such an order should be issued was "before the department" or "pending therein" for decision, would not be sufficient. The indictment in this case recognizes the necessity for such specifications.

Accordingly, the GRAVAMEN OF THE OFFENSE laid in the indictment is that the Post Office Department had before it pending for decision the question whether a fraud-order should be issued against the Rialto Company and that with knowledge of such pending inquiry, Senator Burton for compensation rendered services in the matter or case thus pending with the view and for the purpose of inducing the officials of the Department to decide such pending matter or case against the issue of such fraud order.

This, to wit, the preventing of the issue of a fraud order against the Rialto Grain and Securities Company for compensation, is the precise and only matter charged in the indictment and in each count thereof. Even if it were competent for the United States to have made the charge in the indictment more general as to what was sought to be done (a question that need not be considered here), nevertheless, when the Government specified the particular matters which constituted the alleged offense, the Government is necessarily confined to the proof of those particular matters. Thus the government cannot mislead the defendant by alleging that his defense consisted of services to prevent the issue of a fraud order, and then attempt to prove this charge by showing that he rendered services in the Department in other matters. The Government could not do this even if such other services attempted to be proved were within the prohibition of the statute, but in the present case, as already shown, under POINT II., *supra*, the other services proved were entirely innocent.

Only "services" which were intended by the defendant to prevent the issue of a fraud order as specified in the indictment as being a matter then "before" the

department and "pending" therein for decision—only such services fall within the charge in the indictment. The charge must be proved as laid. Evidence or proof of any other or different services (whether prohibited or innocent) is not only immaterial but incompetent.

See on this subject the opinion of MARSHALL, C. J., in Burr's Case, *ante*, p. 168–9.

This definition of the offense charged is essential to be borne in mind, because the course of the trial shows that it was overlooked by the district attorney and the learned Court below. No evidence was given of services to prevent the issue of a fraud order, but evidence was received of various visits by the defendant to the department which had not the slightest reference to the issue of a fraud order. Such evidence was not only received over the defendant's objection and exception, but what was worse and fatal to the defendant, the jury were charged that the services thus allowed to be proved, though not relating to the issue of a fraud order, and though they were not prohibited by Section 1782 of Revised Statutes, would, if the defendant received compensation therefor, make him guilty as charged in the indictment (Record, p. 249). This we proceed to show.

Communication from the Jury and Additional Charge of the Court.

The jury retired at eight o'clock Saturday evening, March 26, and came into Court Monday morning, March 28, and made to the Court a communication as follows (Record, page 246):

"A juror claims that as Senator Burton was employed by the Rialto Grain and Securities company as general counsel, such fact did not prohibit him from rendering such service before the Post Office Department. The juror's view, he states, is obtained from page 11, last paragraph, and page 12, of Judge ADAMS' instructions in third paragraph. Said jurors while be-

lieving that Senator Burton did at the instance of the Rialto Grain and Securities Company visit the Post Office Department at Washington and perform the services as shown by the evidence, yet as the report of the St. Louis Inspector showed that there was nothing in the complaint, the Senator was not guilty of any wrong doing."

The parts of Judge ADAMS' original instructions to the jury, referred to by the juror, are quoted by the Court (Record, page, 247, bottom, and 248), and they appear in the original charge (Record, pages 238–239). Such instructions are as follows (Record, page 238):

"As you have observed during the progress of the trial, one of the sharp issues of fact for you to determine in reaching a verdict on the several counts is: *whether the services rendered by the accused* for which he received compensation from the Rialto Grain and Securities Company, were rendered to that company, *before the Post Office Department*, or whether they were general professional services rendered that company, by way of advice, counsel, or otherwise, in other matters *not before the Post Office Department.*

"Notwithstanding the fact that the accused was a Senator of the United States he had the legal right, so far as this case is concerned, to practice his profession in any and all of its phases, and to receive compensation therefor in any way and manner, and on any terms as to compensation or otherwise deemed by him best, except that he could not receive compensation for services rendered before the Post Office Department, in any matter pending there in which the United States was interested as already explained."

These instructions are radically wrong in that they assume that the services rendered by the defendant in the five visits were of the character prohibited by Section 1782 of the Revised Statutes and alleged in the indictment, to wit: services to induce a favorable decision on the alleged pending question, to wit, the question of the issuance of a fraud order against the Rialto Company. In these instructions the Court did not submit to the jury the question whether any services were rendered by the defendant before the Post-Office

Department, nor did it submit to the jury the question whether those services, if any, were rendered, were services to induce a favorable decision on the question of the issuance of a fraud order; but the Court assumed both of these facts to exist and then left to the jury whether or not Burton received compensation for services rendered before the Post-Office Department.

Under the original instructions this juror clearly had in mind the fact that the report of the St. Louis Post-Office inspector on the Evans and Hout letters showed that there was nothing in the complaints in these letters to warrant action in the matter of the recommendation of a fraud order (Record, pp. 70, 202). This report, bear in mind, was made November 14, 1902, before ever Senator Burton was employed. These complaints of Hout and Evans were the only complaints which Senator Burton knew of at any time prior to his indictment (*Ante*, pp. 84–87, where this is fully shown). When these facts are borne in mind, and when it is borne in mind further that the matters on which Senator Burton made the five visits before the Post-Office Department did not at all concern the issuance of a fraud order, but related to other matters in which it was perfectly legal and proper for him to appear, it will be seen that what the juror claimed was perfectly correct, namely (page 246),

> " that as Senator Burton was employed by the Rialto
> " Grain & Securities Company as general counsel,
> " such fact did not prohibit him from rendering *such*
> " services before the Post-Office Department " ;

that is, *such services as the evidence showed he did render;* not services in respect of the issuance of any fraud order, for Burton did not even know that inquiry was pending (if any was pending) in regard to the issuance of a fraud order.

The view of this juror, therefore, stated in this communication, was that the complaint of Hout and Evans had been disposed of by the report of the St. Louis inspector on November 14, 1902, as shown in the testimony; and that Senator Burton had been advised of

this fact, as shown by the letter of Harlan to Senator Burton dated November 22, 1902, and that, therefore, Senator Burton did not even know that there was any question of the issuance of a fraud order pending before the Department, much less did he render any service in respect of any question of the issuance of a fraud order ; and thus the defendant was not guilty of any wrongdoing in rendering the services *which he did render* before the department in other matters in which it was perfectly proper for him to appear.

This, then, was the view presented by the communication of the juror. It was a sound and true view and went to the very heart of the case. This view, however, the Court negatives by these further instructions under which the jury were *compelled to find the defendant guilty if only they believed that he received compensation. The Court did not say that (1) if the jury believed from the evidence that services were rendered to prevent the issuance of a fraud order ;* and (2) if the jury believed that compensation was received therefor, that they should find the defendant guilty, but instead thereof the Court said (page 249) :

" I think this will make it clear, so far as the first part of the [juror's] inquiry is concerned, that in order to *excuse* the Senator from *anything* he did before the Department in rendering services, you must find he did not render *those* services for compensation, in accordance with the language of the charge, or that he did not receive compensation for *those* services. *If he received compensation for those services he is guilty under the law.*"

In other words, the Court in this charge included *everything* which Senator Burton did before the Department, *without excluding services which had no possible connection whatsoever with the issuance of a fraud order*, and said to the jury that " in order to excuse the Senator from *anything* he did before the Department in rendering services, you must find he did not render *those* services for compensation. If he received compensation for *those* services he is guilty under the law."

Again, the trial Judge said (page 249):

"He should go before the department, *if at all*, as a representative of the people, so that the relation between him and the office should be that of entire unreserve and fairness unaffected by the fact that he is receiving compensation for the services; so that he should be free, so that he should give information to the department which would subserve the interests of the government and the interests of all concerned, and not be bound by obligations which necessarily inhere from the fact that he is a paid attorney to receive compensation for doing it. In other words, as I said before, the gist of the complaint is rendering services for compensation, and therefore the bare fact that he should be employed and had the right to go before the Department to render services *does not excuse him provided he receives compensation for those services.*"

In other words, the Court here charged the jury that Senator Burton had not a right to go before the Department "*at all*," except "as a representative of the people" and without receiving any compensation.

Again the Court said in its charge (Record, page 248):

"He could go there and answer questions and make suggestions with regard to any matter that was pending there provided he did it in a free and independent way unaffected by the fact of receiving compensation."

Again the Court said (Record, page 248):

"Of course it is not meant that if Senator Burton was employed by the Rialto Grain and Securities Company as general counsel that that fact permitted him to render services before the department, for which he was to receive and did receive compensation. The gist of the offense charged in the case is rendering services there for compensation. That is the gist of it, rendering services for compensation. So that in answer to the first suggestion I will say it is undoubtedly an incorrect understanding of the law as well as of the plain meaning of the statements in the charge, to say that merely because the accused was employed as general counsel he had the right to render such services [that is, such services as he did render] before the Post Office Department."

This charge does not state that the defendant can be convicted only in case the jury believe that he rendered *services to prevent the issuance of a fraud order*, and does not exclude from the consideration of the jury services which the defendant rendered which were in no way connected with the issuance of a fraud order, and there is no statement whatsoever made in this charge distinguishing such services from services (alleged but not proved) in attempting to influence the Department in relation to the issuance of a fraud order.

This further charge was excepted to (Record, page 252).

Furthermore, the counsel for the defendant endeavored to have the Court state to the jury (Record, page 252) " that the requests to charge asked by the defendant, which were given by the Court, constitute as much a part " of the charge as any other parts. In view of the *generality* of the Court's charge as to the " services " the request of the defendant's counsel was not only proper, but necessary to protect the rights of the defendant and to prevent the jury from being misled by the further charge. But the Court refused counsel's request, and directed the jury to retire without giving any such instruction. This request and the ruling of the Court in this respect were as follows (page 252) :

" Mr. Krum : If the Court please, on the part of the defendant, I ask to have your Honor indicate to the jury that the requests to charge asked by the defendant, which were given by the court, constitute as much a part—

The Court : If you will wait a moment the jury may retire.

Mr. Krum : I beg your Honor to state to the jury—

The Court : Stop a moment and then I will hear your argument. I will after the jury retire hear counsel if they have anything to say, or any exceptions they may wish to take to the charge. The court here handed the Foreman of the jury the charge and instructions heretofore referred to and directed the jury to retire for further consideration of their verdict.

MR. LEHMAN: I do not believe that the requests to charge in the manner made by defendant and were given by the Court to the jury were given as they should have been, the suggestions being made by the court at the time that they were mere abstract statements which had the effect to deprive them of something of their force when they were not intended as mere abstractions and were believed by counsel to have specific reference to the case and those instructions, as well as others, ought to be called to the attention of the jury. We must except here as earnestly as it is in our power to do against the charge of the court made now.

THE COURT: If you except, I will allow the exception.

MR. KRUM: What I desired to do in the presence of the jury was to ask your Honor to indicate to the jury, as it was evident the jury did not understand, that it was a fact that the request to charge which were recognized by the court, acquiesced in by the court and given by the court, were just as much a part of your Honor's charge as that which the Court read as emanating from the court itself.

THE COURT: I did tell the jury so on Saturday.

[We respectfully submit that the Court did not tell the jury so on Saturday.]

MR. KRUM: I submit it is apparent they do not understand that they are just as much to be controlled by that part of the instructions as any other part. That is evident from the inquiry made.

THE COURT: The Court has endeavored to answer the only requests made by the jury, and that is all I think should be done.

MR. KRUM: We except to the last ruling of the court."

The instructions here referred to and requested by counsel for the defendant are found on pages 242, 243 of the Record, and are as follows:

"1. That whether the defendant can be adjudged guilty upon the indictment depends upon his having received compensation for a service rendered to the Rialto Grain and Securities Company in seeking to prevent the issue of a "fraud order" by the Postmaster General against the company. The service must have been rendered in the Post Office Department before some officer charged with the matter of inquiry; and must have been intended to induce such

officer to report favorably upon the matter before him, or to decide some question touching a proposed, or contemplated, "fraud order" favorably to the company. The offense consists in the rendition intentionally of the service indicated and the receipt of compensation knowingly for the service so intentionally rendered. It was the privilege of the defendant, as a Senator of the United States, to make inquiries in the Post Office Department of any of its officers in regard to complaints against the Rialto Company, and to make reports as to the same to the Company. The acts of the defendant in the Department must have been in the way of steps against the United States to prevent the issuance of a "fraud order," if one was contemplated, or to bring about a favorable result in an inquiry which might lead to such an order, if such an inquiry was on foot in the Department. If inquiries as to complaints were merely made, and no attempt made to influence any officer in the discharge of his duty, the defendant committed no violation of the statute, no matter what reports he made to his client, the Rialto Grain and Securities Company."

"2. Defendant had the right to engage, for compensation, as counsel in the case of the United States v. Dennis, and to do whatever was necessary and proper to be done in the conduct of the defense, including inquiry and investigation at the Postal Department respecting evidence which might exist there, favorable or adverse to Dennis, and no service rendered by the defendant in connection with the defense of the case against Dennis can be considered in support of the indictment."

"3. Any inquiries made, or services rendered, by the defendant in the Postal Department concerning the books of the Brooks Brokerage & Commission Company, and only concerning those books, are not to be considered as supporting any charge of the indictment."

"4. Defendant had the right to make inquiries at the Postal Department or of Postal officials as to the existence or non-existence of charges against the Rialto Grain and Securities Company, and the making of such inquiries, whether for his own information and guidance, or for the information and guidance of the company, will not support the indictment if there was no effort or purpose thereby to influence the action of any official of the Government."

"5. Before the defendant can be held guilty of the

charge against him it must be proven that he did something in connection with the investigation of the Rialto Grain and Securities Company by the Postal Department intended to influence the action of some official of that Department with respect to such investigation, and that defendant was paid and received compensation for so doing."

"6. As to any claims or demands made by individuals against the Rialto Grain and Securities Company the defendant had the right to act as counsel for the company, and as such counsel had the right to do whatever was necessary and proper to conserve the legal rights and interests of his client as to such claims or demands, and he had the right in that connection and for that purpose to make inquiry of any Department to ascertain the identity of such persons and whether they held the positions they claimed to hold."

While these instructions which were requested by the defendant were given by the Court at the end of the *original* charge to the jury, yet the Court in giving them destroyed their meaning and effect on the jury by a statement as follows (Record, p ge 242):

"These are abstract propositions of law, which I give in connection with the charge, as, perhaps, more fully amplifying it. I am willing to give them, inasmuch as they are asked and they contain general propositions of law."

With all respect to the learned trial Court these are not "*abstract*" propositions of law, but concrete and specific propositions applicable to the particular case and to the evidence before the Court. "*I am willing to give them*," *i. e.*, as a sort of matter of *grace* and not because the defendant had a *right* to have them given.

The giving by the Court of the further charge which it did give, after the jury returned on Monday, to the effect that Senator Burton had no right to go before the Department "*at all*" for compensation, and that "in order to *excuse* the Senator from *anything* he did before the Department in rendering services you must find he did not render *those* services for compen-

sation," and "if he received compensation for *those* services [that is, *anything* he did before the Department] he is guilty under the law," and the other instructions above quoted, given by the Court on its further charge, taken in connection with the fact that the Court utterly failed and expressly refused to state to the jury that Senator Burton could only be convicted for services rendered in connection with the question of the issuance of a fraud order, were clearly erroneous and could not but have misled the jury.

Note that the jury came back for further instructions to clear up a question about which one of the jurors was in doubt, and the court, instead of clearing up this matter, proceeded to give these further instructions, which were erroneous in the respects above pointed out. *From one end of these further instructions to the other there is no statement by the Court that the defendant should be convicted only in case the jury believed that he rendered services to prevent the issuance of a fraud order.* On the contrary, the Court, as above stated, instructed the jury that the defendant had no right to go before the Department "*at all*," except as a representative of the people, and without receiving any compensation, and that

"in order to *excuse* the Senator from *anything* he did before the Department in rendering services, you must find that he did not render *those* services for compensation, in accordance with the language of the charge, or that he did not receive compensation for *those* services. If he received compensation for *those* services, you must find him guilty under the law."

In other words, even if the Court in its original instructions on Saturday had properly given the law on this subject (which we deny) when it came to make this further charge to the jury on Monday, it stated the propositions of law and the duty of the jury incorrectly, and this further charge to the jury compelled the jury to find the defendant guilty if only the jury believed that he received compensation, although he may have performed no prohibited services, and al-

though none of the services performed had any relation to the issue of a fraud order and were not intended or designed to prevent the issue of such an order, and although the United States was not "interested" in any of the matters in relation to which the defendant performed services in the department.

That the trial Court not only mistook the inquiry of the juror, but that the trial Court erred in what it stated to the jury *as to the facts* as well as the law, is evident from the following. The Court further charged (Record, page 250, top):

"You can see plainly that the bare fact that service was rendered before the Department in the way charged in the indictment might be the very reason why there would have been in this case the report that there was nothing in the thing which was being investigated."

THE CHRONOLOGY of the matter is a complete refutation of this statement of the trial Court. The investigation made by the Post-office Inspector and the report made by him (Record, p. 70, p. 202) were made on November 14, 1902. Burton was not employed in this case, nor were any negotiations entered into for his employment until November 17, 1902, and the very earliest interview which Burton had in the Post-office Department was not until November 20, 1902. The "services" "charged in the indictment" were "*from November 22, 1902, to March 26, 1903.*"

The Court, therefore, was clearly in error when it undertook to say that any "service rendered before the Department [November 22, 1902, to March 26, 1903] might be the very reason why there would have been in this case the report [November 14, 1902] that there was nothing in the thing which was being investigated." This is not even a fallacy of *post hoc, ergo propter hoc*, but is a newly invented species of fallacy, which ought to be called *ante hoc, ergo propter hoc*. This erroneous

and mistaken statement of the Court, relating to the very matter which was in the juror's mind, was well calculated to mislead the jury and prejudice the defendant.

Prior to the defendant's employment, the only complaints (Hout and Evans) of which Burton had any knowledge had been disposed of, and that fact is referred to by the juror in his inquiry. The juror's inquiry related alone to the services, which the Court allowed to be proved against the defendant's objection, in the five visits to the department. These services are fully discussed under POINT II., and as is there shown, they had no relation whatever to a fraud order, but had relation wholly to other matters. This fact the juror knew, and his question therefore was that inasmuch as the pending complaint was disposed of before Burton was employed, and inasmuch as the services of Burton in the department had no relation to the issue of a fraud order in any matter pending there, the Senator was not guilty of any wrong doing in rendering services which had no relation to the issue of a fraud order.

The Court (Record, page 248) wholly mistook the inquiry of the juror. The juror had in mind the visits of the defendant to the department on matters not connected with the issue of a fraud order, all of which visits were lawful and constitute all the services of any kind or character which Senator Burton rendered before the department. But the Court in this additional charge assumes that those services, though in no way relating to the issue of a fraud order, were criminal. This false and fatal assumption on the part of the Court is demonstrated by the language on page 249, to wit:

"that in order to excuse the Senator from anything he did before the Department in rendering services, you must find that he did not render those services for compensation, in accordance with the language of the charge, or that he did not receive compensation for those services,"

that is, the services rendered in the five visits to the department. Then the Court adds the fatal sentence that forced the verdict from the jury, to wit: "*If he received compensation for those services he is guilty under the law.*"

That is to say, if the defendant made the mere inquiry on November 20, 1902, as to the existence of any complaints, or visited the department in connection with the Dennis indictment or sought to procure the books of the Brooks Brokerage Company, or made the inquiries as to the bogus inspectors, to wit, Bowman and Shove, these being the services of the defendant in the five visits before the department, as the testimony shows, then referring to such services and to the testimony, the court said that

"in order to excuse the Senator from anything he did before the Department in rendering services, you must find that he did not render those services for compensation. If he received compensation for those services he is guilty under the law."

In giving this direction the Court was not only wrong in the legal proposition, but plainly usurped the functions of the jury and violated the constitutional right of the defendant to have the facts of the case and question of guilty or not guilty of the charge laid in the indictment decided by the jury.

The indispensable elements of the offense charged in the indictment and to be proved by the Government, were these:

1st, that there was an inquiry pending in the department as to whether a fraud order should be issued against the Rialto Company;

2d, that the defendant rendered services in the department "with a view and for the purpose of inducing

the Postmaster-General to decide the inquiry so pending favorably to the Rialto Company;"

3d, that such services were rendered for compensation.

As we have shown above under POINT II., there was a total failure of proof to show that any services were rendered by the defendant for the purpose of preventing the issue of a fraud order, and, hence the Court ought to have granted the defendants motion at the close of the Government's case and his like motion at the close of the testimony, to direct a verdict for the defendant.

But supposing for the sake of the argument, that it be assumed that the defendant knew that there was such an inquiry pending in the Department (which the evidence completely negatives), and supposing further that there is anything in these five visits which could by any possibility have reference to the question of the issuance of a fraud order in the matter so pending, still the charge which we have above quoted is open to the fatal objection that it deprived the defendant of the right to have the jury pass upon the question of whether or not any of these services were intended to prevent the issue of a fraud order. For be it observed that the Court *says nothing about any fraud order or services in connection with the issue of a fraud order.* The Court refers and refers alone to the proof as to the services as shown in the five visits to the Department, and so referring uses this language (page 249):

"that in order to excuse the Senator from *anything* he did before the Department in rendering services, you must find that he did not render those services for compensation, in accordance with the language of the charge, or that he did not receive compensation for those services."

The court shifts the burden of proof from the prosecutor to the defendant. The court ought to have told the jury, if it submitted any question to them whatever, that "unless you find that the defendant ren-

dered services for compensation with a view to prevent the issue of a fraud order, he is not guilty; and the burden of proof is upon the government to show this." Instead of that, the court in the additional charge (page 249) fatally assumes that the services to the Department were not only actually rendered, but that they were of the kind prohibited by Section 1782 of the Revised Statutes, and then casts upon the defendant the onus of excusing himself for the rendering of those innocent and non-prohibited services; and the only way in which the court permitted him to "excuse" himself was by showing that he did not receive compensation. Practically the court said to the jury, "Senator Burton is guilty if he does not *excuse* himself in this particular way."

While the court in this put the burden on the defendant, it did not even permit him to escape being found guilty by showing that the services did not relate at all to the issuance of a fraud order. Even such an instruction would have been erroneous, as the burden is not on the defendant but on the prosecution. It prohibited the defendant from having the benefit of the defense that if these services were not rendered with a view and for the purpose of preventing the issuance of a fraud order, the defendant was not guilty. It also deprived him of the further defense that if at the time when he made these five visits to the Department he had no *knowledge* that a fraud order inquiry was pending, he would not be guilty under the law and the indictment; for this additional charge assumes that the defendant knew that there was such an inquiry pending and rendered the services with a view to procure a decision favorable to the Rialto Company, and this question was not submitted to the jury, but on the contrary the additional charge prevented the jury from considering this question.

Under this additional charge the jurors were not permitted to pass and did not pass upon the question whether the defendant rendered services for the purpose of preventing the issue of a fraud order. The

decision of this question the charge took away from the jury, and the Court decided it in favor of the prosecution. It left only to the jury the question whether the defendant received compensation for his services; for, we repeat, the Court's language is, "If he [the defendant] received compensation for those services, he is guilty under the law".

Proof that the defendant rendered services with a view and for the purpose of preventing the issue of a fraud order is fundamental. It is the very body and gravamen of the case. Now, in this case the proof showed beyond question that, during the time when the said alleged services were rendered by Burton, which are referred to in the Court's charge and additional charge, Burton *did not even know* that there was any question pending before the Department in respect of the issuance of a fraud order *(ante,* pp. 84–87), and hence any services rendered by him could not be, as it is alleged in the indictment, rendered with a view and for the purpose of preventing the issue of a fraud order. The question whether any services rendered by Burton was for the purposes laid in the indictment—to wit, to prevent a fraud order—was necessarily a question for the jury, and a vital error in this case is that this question was not submitted to or passed upon by the jury, but was taken from the jury by Court's charge and additional charge. The Sixth Amendment of the Constitution expressly provides:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or District wherein the crime shall have been committed, and to be informed of the nature and cause of the accusation," etc., etc.

The defendant was not only entitled to be brought into the presence of the jury and have the jury take some part in the trial, but he was entitled to have the jury pass upon the particular charge or accusation made in the indictment. The Sixth Amendment is satisfied with nothing less. The defendant was found

guilty without such particular charge being submitted to or passed upon by the jury; namely, whether or not the defendant rendered services before the Post Office Department for the purpose of preventing the issuance of a fraud order. On the contrary, the charge and especially the additional charge which brought about the verdict excluded from the jury any consideration of the offense laid in the indictment. And so there was, in fact, *no trial* at all by the jury of the defendant's guilt of such offense.

So that we insist that the question whether the defendant rendered services with a view and for the purpose of preventing the issue of a fraud order—has never been passed upon by the jury.

Under the constitutional guaranty of trial by jury, where the defendant pleads not guilty, the only constitutional tribunal that can pronounce the word "guilty" is the jury; and we insist with emphasis that the jury has never decided, and by this additional charge was not allowed to decide, whether the defendant rendered services for compensation with a view to prevent the issue of a fraud order, but were required under the pressure of the additional charge to find the defendant guilty if he rendered for compensation the lawful and proper services shown in the testimony in the five visits to the Department.

SIMILAR ERRORS IN ORIGINAL CHARGE AND INSTRUCTIONS.

The trial court also committed similar errors in its original charge to the jury (Record, page 230) as follows:

"To permit a Senator of the United States, whose influence, by reason of the high position he holds, is naturally persuasive and weighty with executive officers, to take compensation from persons for services rendered such persons before an executive department, would it was thought, create a duty in favor of such

persons arising from the implied obligation of fidelity to the client, from whom he should accept a fee, inconsistent with those relations of "ready confidence, and entire unreserve," which ought to exist between the legislative and executive departments of the Government in the promotion of the public weal, and in the enforcement of the laws of the land."

This charge, above quoted, utterly ignores the fact that the only prohibition in Section 1782 of the Statutes is against taking pay in any matter "in which the United States is a party or directly or indirectly interested." This charge assumes and states that the prohibition is general and absolute against taking compensation for *any* services rendered before an executive department.

This erroneous charge was read over and repeated by the Court in its additional instructions to the jury when they returned on Monday (Record, page 247).

Throughout the original charge to the jury the trial Court stated and gave the jury to understand that if the defendant rendered any services whatsoever before the department for pay, he violated Section 1782 of the Statutes. The Court does not in this charge make any statement—on the contrary, this charge negatives any statement—that the defendant might render services before the department and receive compensation therefor in matters in which the United States is not a party or directly or indirectly interested, and yet not be doing anything within the prohibition of the statutes.

The same thing appears again in the original charge to the jury (Record, page 238):

"As you have observed during the progress of the trial, one of the sharp issues of fact for you to determine in reaching a verdict on the several counts is whether the services rendered by the accused for which he received compensation from the Rialto Grain & Securities Company, were rendered to that Company before the Post-Office Department, or whether they were general professional services rendered that company, by way of advice, counsel or otherwise in other matters not before the Post-Office Department."

In short, the trial Court stated to the jury that if the services rendered "to the Rialto Grain & Securities Company were rendered to that Company *before the Post-Office Department*," then the defendant was guilty, but if they were "general professional services rendered that company by way of advice, counsel or otherwise in matters *not before the Post Office Department*," then he was not guilty.

The special objections to the original charge and additional charge are these:

1st. The charge and additional charge put a ban upon *all* services in the Department and ignored the fact that services may lawfully be rendered before the Department by a Senator for compensation if the United States is not a party or interested in the matter to which such services relate.

2nd. The charge and additional charge held that the services proved by the Government in the five visits, if they were rendered for compensation, violated Section 1782, although the United States had no interest (as the fact is) in the subject matter of such services, and although such services had no relation (as the fact is) to the only charge laid in the indictment—to wit, the rendering of services by the defendant with a view and for the purpose of preventing the issue of a fraud order.

Coerced Verdict.

THE TRIAL COURT ALSO ERRED IN COERCING THE JURY INTO RENDERING A VERDICT OF GUILTY.

The trial Court said, in its further instructions, after it had made some remarks in praise of the character and appearance of the jury (Record, page 250):

"Another trial of this case, which would have to follow in case of failure to agree, would simply require all these proceedings to be had before some other jury, and it is doubtful whether the case can be

presented as to all the facts connected with it that would give you more light, or any jury more light, than has already been given by the proceedings in this case. The trial of such a case is attended with great expense and great trouble to many witnesses and to the Department and to the Court, and another trial ought not to be required unless with faithful conscientious consideration of the facts under the law as laid down by the Court you should fail to reach a verdict."

Why, pray, was it not also said that the trial of such a case is attended with great expense and great trouble to the *defendant?* Is the defendant not entitled to any consideration in this matter, as well as the witnesses and the Department and the Court? This language of the Court is significant in connection with the other remarks and instructions of the Court which we proceed to consider.

The trial Court erred in the following instructions to the jury, when the jury came in for further instructions (Record, page 251):

"In order to relieve any member of the jury who might think otherwise, it is entirely proper to say that the law of the case as laid down by the court is subject always to review by an appellate court. If this court is wrong in its charge and instructions, there is opportunity of reviewing it in an appellate tribunal, so that whatever may be your views as to the court not being correct in the announcement of the law, you can always be assured if it is not correct in the matter that counsel for the defense in case of conviction will have full opportunity of submitting the matter to other tribunals to determine what is the true law upon the subject."

This instruction implies that the instructions of the Court *require a conviction;* else why did the Court say: "If this court is wrong in its charge and instructions, there is opportunity of reviewing it in an appellate tribunal" (the Government could not have a "review in an appellate tribunal"), and that "counsel *for the defense* in case of conviction will have full opportunity of submitting the matter to other tribunals." It is in effect a statement to the jury to go ahead and

convict the defendant, and then if the Court was wrong in its charge, the defendant might have the law reviewed in a higher tribunal. The jury so understood it and proceeded to convict the defendant. Language of this kind has been well commented on by the Supreme Court of Georgia in the case of *Hodges vs. The State*, 15 Ga., 117, in which that Court reversed the decision of the lower Court. In that case the Court said, LUMPKIN, J., giving the opinion (page 121):

"The Court charged the jury, amongst other things, that if he committed error, it could be carried to the Supreme Court and corrected, if against the prisoner; but not so if against the State.

"Again, we must condemn, as we have had occasion to do heretofore, this remark. If defendants have the advantage, as intimated by the Court, it is one to which they are entitled under the law; and it does not relieve either the Court or the Jury from the obligation to mete out to them, not only the full measure of their legal rights, but in cases of doubt, to give to prisoners the benefit of these doubts. To administer justice in mercy, less than this cannot be done."

In the present case the instruction above quoted is much more objectionable than that given in the Georgia case. The communication from the jury (Record, page 246) was:

"*A juror* claims that as Senator Burton was employed, etc., * * * the Senator was not guilty of any wrong doing."

In other words, that *one* juror was apparently in favor of the acquittal of Senator Burton. Thereafter the Court asked (Record, page 250):

"I would like to ask the foreman of the jury how you are divided. I do not want to know how many stand for conviction or how many for acquittal, but to know the number who stand one way and the number who stand another way. I would like the statement from the foreman."

"THE FOREMAN: Eleven to one."

"THE COURT: The jury stand eleven to one. *I gathered that from the communication.*"

In other words, the trial Court inferred from the communication of the jury that one juror was in favor of acquittal on the ground stated, and then the trial Court proceeds to give the instruction above quoted—namely, that "in order to relieve any member of the jury," that is, *in order to relieve this* ONE JUROR *who is in favor of acquittal*, the Court proceeds to say that if the Court has committed error the matter may be carried to an appellate court by the defendant. Under these circumstances, this amounts to a moral coercion of the juror to agree to a verdict of conviction, and the juror evidently understood that that was what the trial Court expected of him, and so agreed with the other jurors for a conviction.

The learned Court below quotes the opinion of the Supreme Court of the United States in the case of *United States vs. Allen* (Record, page 251), apparently under the mistaken supposition that what was said by this Court in the case of *United States vs. Allen* justified this coercion of the jury in agreeing to a verdict.

While a trial court in a criminal case may be allowed in a proper way to urge an agreement among the jury, as was permitted in the case of *United States vs. Allen*, yet the instructions of the Court in the present case went far beyond reasonably urging the jury to come if practicable to an agreement.

VIII.

For the foregoing reasons the judgment and sentence of the Court below should be wholly reversed.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
W. H. ROSSINGTON,
FRED. W. LEHMANN,
For Plaintiff in Error.

APPENDIX.

CONSTITUTION OF THE UNITED STATES.

"ARTICLE III. SECTION 2. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as Congress may by law have directed."

Fifth Amendment to the Constitution.

"No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces * * * nor be deprived of life, liberty or property without due process of law."

Sixth Amendment.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Privileges of Congress and Members.

The Constitution of the United States provides, as respects the privilege of Congress, *inter alia*, as follows:

"They [the Senators and Representatives] shall in *all cases* except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."

Const., Art. I., Sec. 6.

STATUTORY PROVISIONS.

Revised Statutes United States.

"SECTION 731. When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein."

Section 1782 is the one on which the indictment is founded, and is as follows:

"SECTION 1782. No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, Bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust or profit under the government of the United States."

Section 5480 of the R. S., referred to in the indictment, is as follows:

"SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented

to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle,' or 'counterfeit money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any post-office, branch post-office, or street or hotel letter-box of the United States, to be sent or delivered by the said post-office establishment, or shall take or receive any such therefrom, such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court."

Sections 3929 and 4041 of the R. S., which confer authority upon the Postmaster-General in this behalf, are as follows:

"SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing og any kind, or that any person or company is conductinr any other scheme or device for obtaining money of property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, instruct postmasters at any post-office at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation or association of any kind, to return all such registered letters to the postmaster at the office at

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 343.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR.

The court at St. Louis had no jurisdiction to try the cause, nor is such jurisdiction conferred by section 731, Revised Statutes of 1878.

The indictment in this case charges a violation of section 1782 in the respect that services were performed in the Post-Office Department at Washington to prevent the issue by the Post-Office Department of what is known as "a fraud order," the accused being at the time a Senator of the United States and performing such services for compensation. Section 731 of the Revised Statutes of the United States is invoked to sustain the jurisdiction of the United States district court in St. Louis for the reason that, as alleged in the indictment, the compensation for such service was actually paid

to Burton in St. Louis, and that such payment was necessary to complete the offense, or, as the judge trying the case in St. Louis repeatedly ruled and asserted: "The acceptance of compensation is the gist of the offense." It was alleged in the indictment and assumed by the court that the services, if any, that were rendered or to be rendered were done and performed in the District of Columbia and in the Post-Office Department in said District. It is therefore contended by the Government that under section 731 Senator Burton might be indicted, prosecuted, and punished either in the District of Columbia or in the eastern district of Missouri, and the Government, by reason of such section, had a full right to elect to present this case for indictment in that district and to try him in the city of St. Louis. We deny this right, and further deny that the District of Columbia is within any category or description of jurisdiction or tribunal included within the terms of section 731.

In the Revised Statutes of 1878 marginal reference is made on page 139 to section 30 of chapter 169, 14 Statutes at Large, page 484. This is the original statute from which revision was made and from which section 731 was drawn and collated. By reference to that act it will be seen it was an act to amend the existing laws relating to internal revenue and for other purposes. This particular provision of the act undoubtedly had reference, as its context shows, to conspiracies to defraud the United States in matters of revenue. The language of section 30 of chapter 169 of the Session Laws of 1867 is as follows:

"And when any offense shall be begun in one judicial district of the United States and completed in another, such offense shall be deemed to have been committed in either of the said districts, and may be dealt with, inquired of, tried, determined and punished in either of the said districts in the same manner as if it had been actually and wholly committed therein."

By comparing this language with section 731 of the revision it will be observed that in such revision the language has been carefully and deliberately changed. The omission of the words "of the said district" seems to have been deliberate and purposed. By section 731 as it stands, the prerequisite to the trial in more than one jurisdiction of an accused person for any offense begun in one place and ended in another is, that such offense shall have been begun in one "judicial circuit" and completed in another "judicial circuit," and in such event only would the offense be deemed to have been committed in part in one jurisdiction and completed in another jurisdiction. The language which follows, to the effect that it may be "punished in either district," clearly does not obviate the essential requirement of the preceding clause of the statute.

A "judicial circuit" of the United States, in the language of the law and of the statutes of the United States, is as definite, well understood, and limited a term as is the term "judicial district." It must also be remembered that section 731 of the Revised Statutes is a part of the general title "the judiciary," and is to be read in connection with the general definition and use of words under that title. The title deals with questions of jurisdiction and procedure of the Federal courts. Chapter 1 of this title number 13 relating to the judiciary deals with the subject of "judicial districts." Section 530 is as follows:

"The United States shall be divided into judicial districts as follows," and here follows a list of judicial districts established by the act. They are confined to districts in the States of the Union, and do not include in the enumeration the courts of any Territory or of the District of Columbia. This is made plain by section 569:

"When any Territory is admitted as a State and a district court is established therein the said district court shall

take cognizance of all cases which were pending and undetermined in the superior court of such Territory, etc., etc."

A "judicial circuit" of the United States, in the language of the law and of the statutes of the United States, is as definite, well understood, and limited a term as a judicial district. There are nine judicial circuits. Under the same title number 13, "the judiciary," by section 604, judicial circuits are provided for and defined under the following heading of the chapter "JUDICIAL CIRCUITS." The language of the first paragraph of the act is as follows:

"The judicial districts of the United States are divided into nine circuits as follows:"

The first circuit including the districts of Rhode Island, Massachusetts, New Hampshire, and Maine. And so the act continues up to the provision for the eighth circuit. When this revision was made the eighth circuit included the districts of Colorado, Nebraska, Minnesota, Iowa, Missouri, Kansas, and Arkansas. By subsequent legislation other States have been added to the eighth circuit.

It therefore appears by the terms of this act judicial districts and judicial circuits are clearly described and defined and distinguished. In no instance, so far as we have been able to discover in the statute, are the words "judicial district" and "judicial circuit" used convertibly and as synonymous. That the nature of the title and chapters relating to judicial districts and circuits may be made clear, we reproduce the chapter heads and text as they appear in the revision.

Revised Statutes, 1878.

TITLE XIII.

THE JUDICIARY.

CHAPTER ONE.

JUDICIAL DISTRICTS.

"The United States shall be divided into judicial districts as follows: The States of California, Connecticut," &c. [all *States* and the District of Columbia is not among them].

CHAPTER FIVE.

JUDICIAL CIRCUITS.

"The judicial districts of the United States are divided into nine circuits, as follows:"

[Here follow circuits, including districts, and the District of Columbia is not among them.]

"SECTION 731. When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein."

We make, therefore, two points, both equally fatal to the jurisdiction of the court in St. Louis:

First. That the words "judicial circuit" are used by Congress advisedly and cannot, in a matter relating to life and liberty, be altered by the court for any purpose; and the District of Columbia is no part of any judicial circuit, the judicial circuits being confined to the union of districts into

circuits theretofore defined, all such districts being wholly within the limits of organized States of the Union.

Second. That if it were in the power of the court to change the language of the act and to declare the legislative intention to be that the word "circuit" should read "district," it would not aid the jurisdiction, because the districts referred to in section 731 are the districts within the terms of title number 13, "THE JUDICIARY," and that section exclusively applies to districts within organized States, and has, and can have, no reference to the jurisdiction of courts within the boundaries of the territory or of the District of Columbia. It will be noticed that the learned solicitor general has, on page 65 of his brief, sought to correct the statute by substituting the word "district" for "circuit" in what purports to be a copy of section 731. We presume this is an inadvertence resulting from correcting proof without comparing his copy with the original statute, but the statute still reads "circuit" and not "district." It has not been changed since the revision of 1878.

The question thus distinctly arises on the face of the indictment. Two elements or ingredients are essential to constitute the offense charged against the defendant: *First*, the rendering of prohibited services in the Department; *second*, the receipt of compensation for such services. Both are essential to the completion of the offense.

The indictment in this case in each and all of the counts alleges that the services rendered by the defendant were so rendered in the Post-Office Department of the United States. The indictment also alleges in each and all of the counts that the compensation for such services was received by the defendant at the city of St. Louis, in the eastern district of Missouri.

Section 731, R. S., was intended to meet the case where some of the acts material and essential to the crime charged

in the indictment and requisite to its completion occur in one Federal jurisdiction and some of such acts in another Federal jurisdiction, and it provides that in such case the accused may be indicted, tried, and punished in either jurisdiction. It provides for no other case than the one where some of the acts essential and material to the crime and requisite to its consummation occur in one Federal jurisdiction and some in another Federal jurisdiction. The indictment shows on its face that the services alleged to have been rendered by the defendant which are essential to the consummation of the offense were rendered in the city of Washington, in the District of Columbia, and that the compensation alleged therefor, which is also essential to the completion of the offense, was received by the defendant in the city of St. Louis.

The Sixth Amendment of the Constitution of the United States provides as follows:

"In all criminal prosecutions the accused shall be entitled to a speedy and public trial by an impartial jury of the *State and district* wherein the crime shall have been committed, which district shall have been previously ascertained by law."

This makes more definite the provision in article 3, section 2, of the Constitution, which ordains that the trial "*shall* be held in the *State* where the crime was committed." The Constitution in this Sixth Amendment states that the trial must be in the State and district where the crime has been committed—that is to say, in all cases the trial must be within the limits of a State, and if a State has more than one judicial district the trial must be in that district of the State in which the crime was committed.

At common law and under the Constitution of the United States, and in the absence of statute where a crime consists of two acts, one done in one jurisdiction and another in another jurisdiction, no prosecution can be had in either. (See our Main Brief, pp. 162, 163, 164, 166, 167, etc.)

Therefore, in the absence of statute so providing, Senator Burton could not be tried in St. Louis for the offense alleged in the indictment.

The words "judicial district" as used all through Title XIII, "The Judiciary," never include the District of Columbia or the Territories. On the contrary, whenever this Title XIII has any provision in respect of the District of Columbia it mentions the District of Columbia by name, as, for example, in section 705, when it provides that "final judgment or decree by the supreme court of the District of Columbia," etc., may be reviewed by the Supreme Court of the United States, and also in section 811, where there is a provision as to grand juries in the "District of Columbia," the language being "the *circuit* and *district* courts, and the district courts of the *Territories*, and the supreme court of *the District of Columbia* may discharge their grand jurors," etc. So also the provision in section 871 and section 874 providing for depositions in the "District of Columbia" in suits pending elsewhere.

So also this Title XIII, when it refers to a Territory or to the courts of a Territory, mentions the Territory or the courts of the Territory by that name.

The Revised Statutes do not deal generally with the Territories, or with the courts of Territories, or with the District of Columbia, or the courts of the District of Columbia under this Title XIII, "The Judiciary."

Section 731, R.S., which is itself in Title XIII, reads "judi cial circuit," which means only "judicial circuits" defined in Title XIII, composed of the "judicial districts" defined in Title XIII, in the organized States.

The revisers in 1878 must be presumed (nothing appearing to the contrary) to use the words "judicial circuit" or "district" as they had defined them in Title XIII, and they there limited them to judicial circuits and districts in the several States of the Union, and the words do not include any judicial district, much less any judicial circuit in the

Territories or in the District of Columbia. If this section 731 were to be construed as meaning anything else, it would be contrary to article 3, section 2, of the Constitution of the United States and contrary to the Sixth Amendment.

Suppose a man committed a crime consisting of two parts, one in the State of Colorado and the other in the Territory of New Mexico, both parts being essential to the existence of the offense. The offender could not be punished in any court of the Territory of New Mexico for that part of the offense which was committed in the State of Colorado for the reason that article 3, section 2, and the Sixth Amendment of the Constitution of the United States provide that the trial of the crime *shall* take place in the *State and district* in which the offense was committed, and, in the case stated of an attempt to try such a crime in New Mexico for an offense committed in Colorado, the crime would not be tried in the *State* and district in which it was committed.

The same principle applies to a crime consisting of two parts, one part committed in a State and one part in the District of Columbia.

As to an offense committed, one part in a State and one part in a Territory, it cannot be held that section 731 would authorize the trial of such crime in a State on the theory that that part of the statute which undertakes to authorize the trial in a Territory (if such construction were to be placed upon it) could be stricken out as separable, and thus leave the statute to stand as a valid statute authorizing the trial in a State, for the words which it would be necessary to strike out are not separable from the rest of the statute. On the contrary, if the words which (on such a construction) undertake to make the offense triable in a Territory be stricken out, the operative part of the statute is stricken out and nothing remains under which the offense could be tried in the State. These words are, "it shall be deemed to have been committed in either and may be dealt with, inquired into and determined and punished in either."

The statute does not read that the offense shall be deemed to have been committed in the State, and that it may be punished in the State, but that it shall be deemed to have been committed in "*either*" (State or Territory).

We therefore maintain that whether section 731 be construed as it now reads, "judicial circuits," or whether it shall read "judicial districts," it could not give and did not give to the District Court of the United States for the Eastern District of Missouri any jurisdiction to try the offense alleged in the indictment; for in either event the alleged offense was not begun in one "judicial circuit" or in one "judicial district" within the meaning of section 731, and such offense completed in the Eastern District of Missouri, and therefore section 731 in any view has no application to the case.

This question arises on the face of the indictment which is a part of the common-law record and is reviewable on a writ of error. The question also arises on the motion made by defendant at the end of the Government's testimony for a direction of a verdict of not guilty, and also on a similar motion made by defendant at the close of all the testimony, and also on the final judgment.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
W. H. ROSSINGTON,
FRED. W. LEHMANN,
Counsel for Plaintiff in Error.

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Clerk.

Supreme Court of the United States.

JOSEPH RALPH BURTON,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

NUMBER 343.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Brief for Plaintiff in Error in Reply to Supplemental and Reply Brief for the United States.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
W. H. ROSSINGTON,
FRED. W. LEHMANN,
For Plaintiff in Error.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

JOSEPH RALPH BURTON, Plaintiff in Error, vs. THE UNITED STATES OF AMERICA, Defendant in Error.	Number 343.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Brief for Plaintiff in Error in Reply to Supplemental and Reply Brief for the United States.

This brief on behalf of Senator Burton is purely in reply to the supplemental reply brief of the United States filed since the argument. This brief of ours is in no sense a substitute for *our main brief* and *our supplemental brief* already filed, to which we beg the Court's careful attention, but is merely to correct certain errors into which the learned Solicitor-General has fallen and in reply to some of the new suggestions which he has made.

I.

The first point made by the United States in its supplemental and reply brief is that *the offense charged in the indictment is a "misdemeanor," and not a felony*, and that therefore the defendant, under Section 819 of the Revised Statutes, was entitled to only three peremptory challenges. It is admitted that if it be a *felony*, the defendant was entitled, as he claimed on the trial, to ten peremptory challenges, and it would be error to deny, as the Court did, ten peremptory challenges. On the other hand, if the offense charged is a *misdemeanor*, as insisted in the Government's supplemental and reply brief, then the case is within the privilege of the defendant as a Senator, as provided in Article I, Section 6, of the Constitution of the United States, and as shown under POINT V. of our main brief, page 182 *et seq.* That privilege extends to "*all* cases except treason, felony and breach of the peace." The charge against Senator Burton is neither treason, felony nor breach of the peace, and, therefore, the privilege exists.

In the Government's supplemental brief (pp. 41, 42), in relation to the jurisdiction of this Court the learned Solicitor-General says:

> "I may have gone too far in stating in my original brief that there was not a shred of reason for contending that a constitutional question was presented justifying a direct appeal under Section 5 of the Judiciary Act of 1891. It may be that I gave too little attention in that connection to the question of privilege, but I repeat that it was waived," etc.

The supposed waiver is also the subject matter of POINT VII. of the Government's supplemental and re-

ply brief (p. 49), in which it is insisted that the privilege is personal. The reasons why it is not personal, but belongs to the office of Senator, was not waived and is not the subject of waiver, are so fully set forth, together with the authorities, historical and judicial, supporting it, in our main brief (POINT V., p. 182 *et seq.*), that we do not refer to if further in this connection, but refer the Court to our main brief.

II.

The second point in the supplemental and reply brief of the learned Solicitor-General (pp. 11–31) contains nothing new in relation to the facts of this case as they were brought out in the oral argument. He does not dispute the completeness or the correctness of the statement of facts, as carefully given under POINT II. of our main brief, extending from pages 52 to 120, wherein we show the subject matter of each of the five visits of the defendant to the Post Office Department, and quote from the record by page *all* the testimony bearing on those five visits.

The following facts are there shown conclusively and indisputably:

(a) None of the five visits made by Senator Burton to the Post Office Department had the slightest reference to any fraud-order inquiry, but related wholly to other and distinct matters.

(b) We ask particular attention to pages 84, 85, 86 and 87 of our main brief, wherein by reference to the

record, page by page, we show that during the time of Burton's employment by the Rialto Company he *did not even know* that any fraud-order inquiry was before the Department or pending therein. Moreover, we show that the alleged services in all of the five visits related to something distinctly other than the issue of a fraud order.

(c) In point of fact, during Burton's employment between November 18, 1902, and March 26, 1903, when the employment ceased, there was " no case " against the Rialto Company pending before the Post-office Department, and certainly none that Burton knew of. The pages of the Record showing this are carefully collated in our main brief at pages 87–95, and make this fact indisputable.

In the Government's supplemental and reply brief, under POINT II, the Solicitor General states with reference to the conference between Harlan and Burton on the train respecting Burton's employment (p. 13), that " it is inconceivable that Harlan did not mention the complaints and inquiry which he knew were pending." Harlan did not know that any such inquiry was pending, because the Hout and Evans complaints had been reported against. (Dice's Evidence, Record page 70 ; Price's Evidence, Record page 202). And the learned Solicitor General in discussing this point wholly omits to refer to the positive testimony of Senator Burton, found in the Record at page 218, as follows :

" Q. At the time of the interview between Mr. Harlan and yourself, in which the details of your employment were arranged, was there any indication given to you that there had been any complaint made against

the Rialto Grain and Securities Company? A. No sir, Mr. Harlan said to me that there was absolutely nothing against the company, and he said, 'if you do not believe it, go and inquire yourself.'

"Q. So is it a fact that it was on this occasion that you first learned that there was any such thing as a complaint against the company? A. Yes, sir."

The Solicitor General also omits to refer to Senator Burton's testimony that after he had received the letter from Harlan of November 22, stating that the complaints had been investigated by the Post-office Inspector and he had made a report in favor of the company relative to the same, Senator Burton "never gave the matter of such complaints another thought" (Record, p. 220).

This fact, fully established by uncontradicted evidence, is a complete solvent of all the suspicions sought to be engendered—this fact, namely, that the visits of Senator Burton to the Department were made when he supposed and believed that there was no fraud order inquiry pending, and that each of those visits was occasioned by some other matter which arose independent of any fraud order inquiry.

(d) The supplemental and reply brief of the Government ingeniously avoids any reference to the testimony of Senator Burton and of Mr. Cochran (the Government's only witness to sustain the charge in the indictment), that at the very first interview on November 20th (which the Solicitor General discusses at such great length) Senator Burton distinctly informed Mr. Cochran, as Mr. Cochran admits, he [Burton] "would not undertake to appear in the Department as against the United States" (Record, page 147).

On this important point Senator BURTON testified as follows (Record, page 218):

"Q. Was the interview between yourself and Mr. Cochran limited to this, or did anything further take place, as you recall? A. I had previously told Mr. Cochran, as I stated, that, if Maj. Dennis was indicted in the other matter, that I expected to help defend him, and then I said to him: 'Now, Cochran, I am the counsel for the Rialto Grain and Securities Company. Major Dennis owns the company. He is a stranger to me. I have been assured that the company is organized and its methods are all right. But I do not know, and if anything comes into the department that puts you upon inquiry, any complaints or anything of the kind, I wish you would advise me, because, notwithstanding I am counsel for the company, I am not its counsel here. I cannot be retained under any circumstances to appear in the department as a paid attorney.'

"Q. Now, Senator, at that time did you— A. But there is one more expression I omitted there. I said 'Another thing, Mr. Cochran; in case that it should become necessary to recommend summary action on any complaint, disregard my request entirely; because I won't answer any of these complaints, and I won't remain attorney of the company or counsel for the company, if it has any trouble with the department.'"

COCHRAN, though present at the trial, was not recalled to rebut or controvert any of these detailed statements of Senator Burton. On the contrary, Cochran confirms them, as will be seen by his testimony on page 147. COCHRAN thus testifies:

"Q. It is a fact, isn't it, as you recall, this occasion when Senator was advised of these two complaints, was the only one upon which he was advised of any complaints having been lodged against the company? A. That is my recollection of the matter.

"Q. At any of these interviews between Senator Burton and yourself prior to the indictment, did he indicate to you that he would not undertake to appear in the department as against the United States? A. He did.

"Q. Are you able to recall on which occasion that occurred? A. Why, I cannot with any certainty. The Senator told me that several times.

"Q. Disclaimed, whenever the occasion arose, didn't he, any purpose or intention to appear there against the United States? A. I think he did, yes, sir.

"Q. Do you recall his having indicated that so far from desiring to appear as against the United States, if any occasion arose when summary action was necessary that he did not even ask to be notified with reference to it? A. No, sir, I cannot quite recall that. He did say, however, that he would not antagonize the department, no matter whether he thought they were right or wrong or not, that even if he thought the position taken by the department were wrong, even then he would not oppose them."

On this important point therefore, viz., that Cochran was from the first informed by Senator Burton that he would not act for the Rialto Company as its counsel if any complaints were made, both Cochran and Burton agree.

It is a false and unsound assumption which pervades the entire brief of the Solicitor-General, that *inquiries* made by the defendant at the Department as to whether complaints have been filed, etc., etc., even when accompanied with the statement that if any trouble arose between his client and the Department he (the defendant) would not appear or act for his client, and, further, that in such event he would not remain the counsel for the company,—we say it is a false and unsound assumption that such inquiries constitute a prohibited service. There is no such prohibition in Section 1782. The prohibition is against rendering *services* in a matter before the Department in which the United States has an interest, not against making *inquiries* as to whether there is a matter before the Department, and this statute, it must be borne in

mind, is a criminal statute and must be strictly construed.

We wish to affirm it as our deliberate opinion and judgment that Senator Burton, in any of the visits which he made to the Post-office Department, made no inquiries which, as the general counsel of the company, he might not legally and properly make, and that in making such inquiries he rendered "no services" whatever within the prohibition of Section 1782, and at all events he did not thereby render any services "with the view and for the purpose" of preventing the issue of a "fraud order"—the sole and only charge in the indictment, and the sole and only matter material under this indictment.

So that we have the following undisputable facts:

(a) The contract excluded any prohibited services.

(b) Burton did not know of any pending fraud order inquiry, if any was pending.

(c) The five visits show no services having any relation to any fraud order inquiry; each and all of the said visits relate distinctly to something else, namely, the Dennis indictment, the bogus inspectors Bowman and Shove, the McGowan matter before the Indian Department, the return of the books of the Brooks Brokerage Company, &c.

(d) This is conclusive and ought to have ended the case below, namely, that with all the zeal of the Post Office officials and the prosecuting officers in this case, Cochran is compelled to admit on his cross-examination, as follows (Record, pages 146, 147):

"Q. At any time from the beginning of Senator Burton's indication to you that he had any connection with the Rialto Grain and Securities Company, there was no discussion between you and him [Burton], was there, as to the issuance or non-issuance of a fraud order as it is called against the Company. A. I think not.

* * * * * *

"Q. I understand you, then, that you are not able to recall any occasion upon which the Senator made any representation to you or had any conversation with you with reference to the issuance of a fraud order? A. No, sir.

* * * * * *

"Q. There was no discussion between you, was there, on this occasion, of the merits of the representations of Mrs. Evans or Mrs. Hout? A. No, sir.

* * * * * *

"Q. It is a fact, isn't it, as you recall, this occasion when Senator was advised of these two complaints, was the only one upon which he was advised of any complaints having been lodged against the company? A. That is my recollection of the matter."

What a preposterous and unjust charge is here being urged against Senator Burton, indicted specifically and only for trying to prevent a fraud order by his visits to Cochran, when in all of them from the beginning to the end the question of a fraud order was never discussed nor was it the subject of any representation or of any conversation between Burton and Cochran.

The Government's supplemental and reply brief refers to Harlan's *unanswered* letter of December 2d (Record, page 135); also to Harlan's letter of December 3d and Burton's reply thereto; and to the telegrams in relation to turning over the books of the Brooks Brokerage Company in relation to McGowan, the

Indian agent. These letters and telegrams we have fully and carefully discussed in our main brief, pages 95 to 114, to which we refer the Court.

We there show (pp. 95, 96):

> "1. That they had no reference whatever to any fraud order inquiry.
>
> "2. They related wholly to matters distinct from and having no reference to any fraud order, and these matters were not within the prohibition of Section 1782, were entirely proper, and were such as in no possible construction of Section 1782 was the United States 'interested therein, directly or indirectly.'
>
> "3. They contain no admission of the rendering of any prohibited services or of any offense whatever, and were mostly, if not altogether, irrelevant and incompetent—of no evidenciary value against Burton, but properly read and understood are evidence in his favor in disproof of the charge laid in the indictment."

III.

The third point in the Government's supplemental and reply brief is devoted to the question of the "interest" of the United States. We have discussed this question fully in POINT I. of our main brief, pages 20 to 51, to which we refer. We only observe here that the learned Solicitor General in his reply brief admits that there must be some principle of limitation in this statute, and that it does not embrace everything that may come before any of the departments, and he expresses his inability to define what the limitation is.

We submit that in view of the legislative history of the statute, and the use of the word "interest," which

had a settled meaning, and the canon of construction that criminal statutes must be construed strictly, and *strict in proportion to the severity of the punishment*, it must, we submit, be held that the statute applies only to cases where the United States has a property or pecuniary interest, or will gain or lose something by the decision of the particular matter which is before the department.

It is not necessary in this case to lay down any universal rule. Unless it can be held that the subject matter of the defendant's five visits to the department in relation to the Dennis indictment, the bogus inspectors Bowman and Shove, the McGowan matter, and the books of the Brooks Brokerage Company—unless it can be held that these are matters in which the United States was "interested," it can not be pretended that Section 1782 would apply; but if it would apply *prima facie* and generally to visits to a department, it is enough for this case to say that the subject matter of the five visits of Senator Burton had not the slightest reference to any fraud order, *the only charge alleged in the indictment.*

It will be observed that the learned Solicitor General in his brief admits that the words "*in which the United States is a party or directly or indirectly* INTERESTED" *necessarily make a limitation* and confine the operation of the statute to the matters thus limited; *but he is unable to point out any line of demarcation* between these matters in which the United States is "directly or indirectly interested" and those in which the United States is not "directly or indirectly interested." We have stated in our main brief, and we repeat it here, that according to well settled law which was in force when this statute was enacted, and which was known

to the Judiciary Committee of which Judge TRUMBULL, who reported the statute, was chairman, and according to the numerous cases decided by the courts, referred to on our main brief, the line and only line of demarcation which can be drawn is between those matters in which the United States has a pecuniary or property interest and those in which the United States has not such an interest. Any other view effaces the words " in which the United States is directly or indirectly interested " and leaves the statute without limitation. Furthermore, *there is no practicable way in which the courts can administer this statute except by holding that it means a pecuniary or property interest.*

In addition to all this, this is a criminal statute and must be strictly construed, for the reason so emphatically, justly and forcibly stated by this Court in *United States vs. Brewer*, 139 U. S., 288, where this Court said :

" Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

United States Not a " Party."

As was pointed out on the oral argument of this case, the statute designedly uses THE WORD " PARTY " to apply to the enumerated matters, namely, proceeding, contract, claim, controversy, charge, accusation and arrest; and the United States is a party to all courts martial, and is frequently if not always a party before any civil, military or naval commission.

To any inquiry in reference to a fraud order the United States is not a party within the meaning of

Section 1782. The function of the Post-office Department is to *decide* the matter. While this is an administrative function, it is quasi-judicial in its nature.

The meaning of the word "party" as used in Section 1782 is satisfied by confining its application to cases in which under common usage the word party is employed, and it is neither necessary nor proper in this criminal statute, which must be strictly construed, to give the word party an unusual meaning. The true nature of an inquiry as to whether a fraud order shall be issued is that it is an administrative inquiry, and to apply to the United States in such an inquiry the word "party" is contrary to the accepted and universally understood meaning of that word.

IV.

Section 731 of the Revised Statutes does not Confer Jurisdiction on the Court Below.

The words in Section 731 are "Judicial Circuit" and not "Judicial District." As we stated in the oral argument, we took pains to examine the enrolled copy of the Revised Statutes of 1878, and procured an exemplification of said Section 731, which was exhibited in court. This enrolled act, of which the Court must take judicial notice, contains in the first clause of Section 731, the words "Judicial Circuit" and not "Judicial District," and it is not a misprint in the Revised Statutes nor a clerical error, but is what Con-

gress enacted, and the enrolled act is conclusive, as held by this Court in *Field vs. Clark*, 143 U. S., 649.

We therefore insist that as Congress struck out the word "District," and put in the word "Circuit," this Court cannot strike out the word "Circuit" and restore the word "District."

But even if the word is to be rendered "District" and not "Circuit," that does not help the matter for the prosecution, because as shown in our supplemental brief on the question of jurisdiction under Section 731, the words "Judicial District" were used throughout Title XIII., "The Judiciary," without exception, as *meaning the Judicial Districts which that Title had expressly defined*, and those were only judicial districts in the States, as such districts had been known continuously from the organization of the judiciary in 1789 down to the present time, and not in the District of Columbia or in the Territories.

Justice PECKHAM correctly understood our point, as appeared from the inquiry addressed during the argument, to wit: that the words "Judicial Circuit" and "Judicial District" mean Judicial Circuit and Judicial District in the States and *not in the Territories or in the District of Columbia* and that when the District of Columbia or the Territories are referred to in Title XIII. of the Revised Statutes, they are always specifically referred to by that name and are never referred to as "Judicial Districts" or "Judicial Circuits."

Section 731 is printed under Title XIII., Chapter 12, "Provisions Common to More Than One Court or Judge." This whole Title XIII. deals with the *United States Courts* properly so-called, that is, the District Courts, Circuit Courts, and the Supreme Court; and when Chapter 12 deals with "Provisions

Common to More Than One Court or Judge," it *refers to these United States Courts* and the Judges sitting therein, unless it is otherwise expressly mentioned. This Title XIII. nowhere undertakes to deal generally with the District of Columbia or with the Territories, or with the courts in the District of Columbia or with the courts in the Territories. *Wherever any provision in this Title XIII. is intended to apply to the District of Columbia, the District of Columbia is mentioned by name;* and where it is intended to apply to the territories, the territories are mentioned by that name. Therefore, the words "Judical Circuit" and "Judicial District" as used in Section 731, as well as elsewhere in Title XIII., have and *can have but one meaning, namely, the Judicial Circuits and the Judicial Districts established and defined in Title XIII.*

The learned Solicitor General calls attention to the fact that Section 731 is printed not under Chapter 5, but under Chapter 12, of Title XIII. This is correct, but the suggestion is unimportant, for *the entire Title XIII. deals with the United States Courts and not with Courts in the District of Columbia or Courts in the Territories.*

The matter is in a brief compass. To sustain the jurisdiction of the Court below, it must appear that the *whole* offense was committed in the Eastern District of Missouri. This is impossible, for the indictment alleges that all the services were rendered in Washington, in the District of Columbia; and if this were not so in the indictment, the indictment would be bad for not alleging the *place* where the services were rendered. See on this point *United States vs. Burr* (our main brief, p. 168), in which Chief Justice MARSHALL says:

"The place in which a crime is committed is essential to an indictment, were it only to show the jurisdiction of the Court."

The Government did not attempt to prove any prohibited services of Senator Burton except before the Department at Washington.

No Agreement to Perform Prohibited Services Was Alleged in the Indictment or Proved on the Trial.

As a suggestion to help out the utter failure of the prosecution to prove that any prohibited *services* were performed, something was said during the course of the argument, that the statute prohibits an *agreement* to perform services for compensation, as well as prohibits services themselves. This is true, but in the present case no agreement to perform services is alleged in the indictment, no agreement to perform services was proved by the testimony of any of the witnesses, and there is absolutely no ground for stating that there was any agreement made to perform services before the Post-office Department in the matter of a fraud order, and of course there was no proof that any such agreement was made in the Eastern District of Missouri. As was pointed out on the argument, this is not an indictment on an agreement to render services, but is expressly an indictment for rendering alleged prohibited services for compensation.

Something was said in the course of the argument before this Court, either by the Solicitor-General or by some member of the Court, suggesting whether the

payment in cash in St. Louis on March 26, 1903, might be regarded as a payment *under an agreement* to perform services, and therefore that the jurisdiction of the Court would hold. A complete answer to any such suggestion is that there is no allegation in the indictment that there was any agreement to perform services to prevent the issuance of a fraud order, no agreement to perform services to prevent the issuance of a fraud order was proved, and of course no agreement of that kind was made in the Eastern District of Missouri. No such agreement could have been made on March 26, 1903, when the cash payment was received, for whatever services were performed had already been performed, and there was no agreement then made to perform services in the future. So that it stands beyond question on the indictment and on the proof in this case, that there was absolutely no agreement made in the Eastern District of Missouri, or anywhere else for that matter, to perform services before the Post Office Department to prevent the issuance of a fraud order. Neither the performance of services nor any agreement to perform services took place in the Eastern District of Missouri; the only thing that took place in the Eastern District of Missouri was the cash payment of March 26, 1903, at which date Senator Burton's employment as counsel, terminated.

Section 731 can only apply to cases where the crime was begun in one "district" and completed in another "district." In no other case does it apply; and therefore it can have no application if one of the districts is not a "judicial district" within the meaning of Section

731. *It is not enough that the place where the trial is attempted to be had is one of these judicial districts; both the place where the offense is alleged to be begun* **and** *where it is alleged to be completed must be judicial districts* within the meaning of the statute, or else the statute has no application, for the statute says that in the cases for which it provides, the trial may be had "in *either* district." Moreover, this, if it attempted to make a crime committed in a *State* triable in a Territory or in the District of Columbia, would render the Section 731 so construed unconstitutional (see our Supplemental Brief already filed, pp. 9, 10).

The learned Solicitor-General refers on his supplemental brief (pp. 44, 45), to the Act of February, 21, 1871, and to the Act of March 3, 1901, which provide in substance that the constitution and all general laws of the United States which are *not locally inapplicable* shall have the same force and effect within the District of Columbia as elsewhere within the United States.

There is nothing in the said Act of February 21, 1871, or in the said Act of March 3, 1901, to solve the inquiry which arises on Section 731 of the Revised Statutes. The very question which arises on Section 731 is what the words "judicial circuit" or "judicial district" mean. In the solution of this question said Acts of 1871 and 1901 furnish no aid. The first question is what these words in Section 731 mean, *and then, and not until then,* the question would arise under said Acts of 1871 and 1901, whether this Section 731 is a "*general law*"—and we say it is not, but refers only to "judicial circuits" or "judicial districts," *as*

defined in "Title XIII., The Judiciary"—and this Section 731 (using "judicial circuits" or "judicial district" in this defined and well-known meaning) is by *these very* terms, "locally inapplicable" (words used in Acts of 1871 and 1901 cited by Solicitor General) to the District of Columbia.

As to Section 61 of the District of Columbia Code, cited by the Solicitor General, it is enough to say that that does not deal, or undertake to deal, with place where a crime committed partly in one place and partly in another may be tried.

The question, therefore, remains as to what is meant in Section 731 by "Judicial Circuit" or "Judicial District," and none of the statutes cited by the Solicitor General helps in the solution of that question.

The Solicitor General states (p. 45):

"It [The District of Columbia] is a judicial district."

The District of Columbia may be *a* judicial district, but the question under Section 731 is whether the District of Columbia is a judicial district *within the meaning of that section.* It may be a judicial district for some purposes, to wit, the purposes of holding courts of the District and for other *purposes provided in the District of Columbia Act;* but the question under Section 731, which is part of Title XIII., of "The Judiciary," is whether Section 731 is a judicial circuit or judicial district, *within the meaning of that title.* We say that it clearly is not. The reasons are fully stated on our supplemental brief heretofore filed, and to which we now refer the Court for a fuller discussion of the point.

Construction of District of Columbia Statutes as Contended for by the Solicitor-General Would Make the Statutes Unconstitutional.

Furthermore, if the statutes cited by the Solicitor-General were to be construed as attempting to make the words "Judicial Circuit" or "Judicial District" include the District of Columbia, such statutes would to that extent violate the Constitution of the United States, Article 3, Section 2, and the Sixth Amendment, as shown in our Supplemental Brief already filed, pp. 9, 10.

It would be no answer to this proper construction of Section 731 that it might permit certain offenses committed partly in a territory or in the District of Columbia and partly in a State to go unpunished. That would be nothing more than would occur at the common law and if there were no statute at all.

Furthermore, it is a well settled principle that every statute amending the common law must look out for itself; and especially is this true of a criminal statute, and no cases will fall within the statute except such as the legislative body have expressly put there.

The remedy, if any remedy is desired, is by an appeal to the legislative body to enact proper legislation; the courts can not supply the want of it. If Congress thinks the situation calls for additional legislation, such legislation can be had, and Congress can so define a crime that whether it is begun in the District of Columbia or in a territory and completed in a State,

or the reverse, the proper punishment may be had. Such would be the proper course rather than to stretch the statute to mean something that evidently it was not intended to mean and does not mean.

V.

The Court below had no jurisdiction as respects the indictments based on the four checks.

The discussion of this subject in our main brief under Point II. is full, and we are satisfied with, and refer the Court to it without repeating or undertaking to repeat or restate the arguments here.

The Solicitor General places the jurisdiction as respects the checks wholly upon what he calls a "custom" stated in the testimony of Mr. Brice, cashier of the Riggs Bank, as follows (Record, pages 106, 107) :

"Q. Go on and state the course of dealing with that check, and others of that kind. A. The usual custom of the bank, as I stated, is to deposit the check to the credit of the depositor ; send it forward direct either to the place where it is drawn for collection, or else to some convenient collection agency near the place where the check is drawn. If the check is not paid, it is returned to the bank in the usual course, going to the bank where it is first sent, and then it takes one of two courses : that check is held in the bank teller's possession until the depositor calls and takes it up, or else charged against his account as if it were a check drawn against his account, and is surrendered to him on settlement of his account, together with other checks or vouchers which he may have drawn, the depositor being duly notified of such non-payment.

"Q. Was there with the Riggs National Bank any

agreement made with Senator Burton contrary to the course you have just indicated as occurring? A. I know of no such special agreement."

Mr. Brice was merely testifying to a practice universal among banks everywhere, and he did not profess to state any "custom" peculiar to Washington. Moreover, he expressly stated (p.107) that there was no special agreement made with Senator Burton in respect of the deposit of these checks and receiving credit therefor.

In the present case, the course taken by the Riggs Bank was exactly the course ordinarily taken by a bank where a deposit is made and an immediate credit given.

On the oral argument, it was suggested by one of the Justices that some banks put in their pass-books a notice to the depositor that all items are taken for collection unless otherwise stated. There is no proof in the present case and no pretense that any such notice existed on the pass-book of Senator Burton in the Riggs National Bank. The very fact that such a statement is printed on the pass-book of a bank shows that without such a statement the ordinary rule of law applies —namely, that when a bank takes a negotiable instrument under an endorsement and transfer of title and credits the depositor, the bank becomes debtor and the depositor becomes creditor of the bank, and the instrument is not taken for collection.

The language of Brice, the cashier of the Riggs Bank, referring to the forwarding of checks "for collection," with the understood right to charge it back if not paid, shows no custom contrary to the legal effect of the transaction. His words were general words, and the legal effect of what was done—namely, the endorsement and transfer of the title of the check and the

crediting of the check on the pass-book—cannot be controlled by general words that the custom of the bank was to *forward* checks for collection. Observe that what the cashier states is *not that the bank took the checks for collection*, but that the bank *forwarded them for collection*, which is a very different matter; for, whether the bank acquired the title to the checks, as we maintain, or whether it took the checks for collections, as the Government maintains, the bank would in either event forward the checks for collection, or deposit them in other banks. *There was no custom of taking a check for collection*, and Brice, the cashier of the Riggs Bank, does not testify that there is a "custom" of taking a check for collection.

But Even if the Riggs National Bank had Taken the Checks for Collection (Which We Deny), yet the Subsequent Endorsees of the Checks, if They Were Agents at all (Which We Deny), Were the Agents of the Riggs National Bank and Were not the Agents of Burton; and Therefore Burton was not Present in St. Louis When These Checks Were Paid, and They Were not Paid to Him.

We discuss this point in our main brief (page 148), citing the decisions of this Court which are conclusive on that point; to which point we notice the Solicitor General makes no reply.

VI.

"One good Count" theory of Solicitor General.

Finally, the Solicitor General says that if the Court had no jurisdiction as respects the checks, it had jurisdiction as respects the payment in cash on March 26, 1903, and that if one Count in the indictment is good that is sufficient.

To this there are two answers:

The first one is made in Point IV. of our main brief (page 174), namely, that this was not the payment for any services rendered by Senator Burton before the Post-Office Department.

The other answer is that if the Court had no jurisdiction as respects the four offenses represented by the checks in counts six, seven, eight and nine, the judgment must be reversed for the reasons specifically set forth in our main brief, pages 171–173.

The facts shown in the Record, as they are referred to in our main brief on said pages 171–173, show that the principle relied on by the Solicitor General, that if one count is good it is sufficient, can have no possible application to this case.

The learned Solicitor-General states in his supplemental and reply brief that cash was paid to Senator Burton in person at St. Louis, referring to the payment of March 26, 1903, and cites certain cases in this Court to the point that one good count will sustain a judgment of conviction. Stated in this bald fashion, this proposition is not true. The correct statement is that which is made by Mr. Justice GRAY in the case of *Claassen vs. United States*, 142 U. S., 146:

"And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because *in the absence of anything in the record to show the contrary*, the presumption of law is that the court awarded sentence on the good count only."

So far from the learned Solicitor-General's statement being true, there are two cases cited by him in this Court, *Ballew vs. United States*, 160 U. S., 187, and *Putnam vs. United States*, 162 U. S., 687, in each of which this Court held the judgment below *good on certain counts*, and *reverses the judgment as to other counts*. Mr. Justice GRAY, Mr. Justice BROWN and Mr. Justice SHIRAS, in their concurring opinion in *Selvester vs. United States*, 170 U. S., 262, 271, state the decision in these two cases as follows:

"In *Ballew v. United States*, 160 U. S., 187, 203, and in *Putnam v. United States*, 162 U. S., 687, 715, in each of which a judgment upon conviction on an indictment containing two counts was affirmed as to one count, and reversed as to the other count," etc., etc.

The principle stated by the learned Solicitor General applies where this Court on writ of error is examining an indictment to see *whether or not on the face of the indictment* and on the face of the verdict and judgment the indictment is good. *But where there are exceptions to the rulings of the Court in the progress of the case either on the admission of evidence or in instructions to the jury, if these rulings are erroneous this Court on writ of error has a right and it is its duty to reverse the judgment of the lower Court.* And as to such rulings, the principle that where one count is good the judgment must stand, has absolutely no application.

In the case, for example, of *Claassen vs. United States*, 142 U. S., 140, above cited, the question arose only on the indictment. Mr. Justice GRAY said (page 147):

"In the case now before us, the record does not show that any instructions at the trial were excepted to, and the jury did not return a general verdict against the defendant on all the counts, but found him guilty of the offences charged in each of the five counts now in question. This being the case, and the sentence being to imprisonment for not less than five years nor more than ten, which was the only sentence authorized for a single offence under the statute on which the defendant was indicted, there is no reason why that sentence should not be applied to any one of the counts which was good.

"The objections assigned and argued to the rulings and instructions at the trial cannot be considered by this court. Upon writ of error, no error in law can be reviewed which does not appear upon the record, or by bill of exceptions made part of the record. The case settled by the judge presiding at the trial, pursuant to a rule of the Circuit Court, was for the single purpose of a hearing in banc in that court, as upon a motion for a new trial, and is no part of the record on error. No bill of exceptions was, or, as we have already adjudged, could have been allowed by the Circuit Court to the rulings and instructions at the trial, because the conviction of the defendant was before the passage of the Judiciary Act of March 3, 1891, c. 517, and while the laws did not provide for or permit a bill of exceptions in such a case as this. Neither the assignment of errors nor the plea of *in nullo est erratum*, can give this court jurisdiction of errors not appearing on the face of the record. *In re Claassen*, 140 U. S., 200. Judgment affirmed."

The only errors, therefore, which could be noticed in the case of *Claassen vs. United States* were errors appearing on the face of the common law record, not errors in any bill of exceptions, for there was no bill of exceptions.

So, also, the case of *Evans vs. United States*, 153 U.

S., 584, involved merely the *sufficiency of an indictment on its face*, and did not involve erroneous rulings of the Court in the progress of the trial.

Moreover, and conclusively, the principle that where one count is good the appellate court will, if there is nothing to the contrary in the record, affirm the judgment as to such good count, has no application in this case, because this record shows affirmatively that the judgment and sentence of the Court was rendered upon and included punishment for each of the offenses charged in the Sixth, Seventh, Eighth and Ninth Counts, that is to say, for offenses over which the Court in St. Louis had no jurisdiction. The proceedings in the Court below showing the truth of this statement will be found summarized in our main brief (pages 171, 172, 173).

There is not one good count in the present case. What the Solicitor General means is, clearly, that there was one payment in St. Louis, namely, the payment in cash on March 26, 1903. That, however, does not make a good count. In order to constitute an offense under the statute there must be *services or an agreement to render services as well as payment therefor*, and the mere fact that there was this cash payment in St. Louis on March 26, 1903, does not in and of itself constitute one good count. As we say in our main brief, page 174, there was an utter failure on the part of the Government to prove the rendition of any services to prevent a fraud order, for which the said payment on March 26, 1903, was compensation. The services as to the checks and the payment by check should have been wholly taken out of the case, and when these were entirely out of the case, it would then have stood before the St. Louis Court simply that Burton at the conclusion of his employment had been paid in cash $500 on March 26,

1903, and there would have been no proof whatsoever of any services rendered therefor to prevent the issuance of a fraud order. It is therefore utterly impossible for the Solicitor General to state that there was one good count. There is not one good count, on any theory, unless it is the false theory repeated by the trial Court at least five times in the course of the trial that "compensation is the gist of the offence," and that, therefore, applying this principle, if the jury found that the defendant received $500 he was guilty irrespective of whether it was pay for the rendering of any other services or not.

It is an unsound proposition and probably misled the court throughout the trial, **that compensation is the gist of the offense.**

The offense consists of two parts. *First*, the rendering of services prohibited by Section 1782, and as alleged in the indictment. *Second*, the receipt of payment therefor. And it can no more be predicated of compensation that it is the gist of the offense, than it can be predicated of the services that they are the gist of the offense. The truth is that neither is the gist, but that both are essential to the completion of the offense.

VII.

Errors in the Additional Charge.

We maintain as long as this additional charge stands in the record that it must inevitably result in a reversal of the judgment below. We have discussed

this matter very fully in POINT VII. of our main brief (page 215 *et seq.*), to which we refer without here restating the grounds of the argument. The Solicitor General attempts to sustain this additional charge by reference to certain instructions which the *defendant* asked before the jury retired the first time, and which are found on the record (pp. 242–244).

We make the following observations.

These instructions stood discredited from the first by the following statement of the Court, page 242:

"THE COURT: I have been asked by counsel for defendant to give certain declarations here, and while I think they have, in the main, been covered by the charge, yet I will give them to you.

These are abstract propositions of law, which I give in connection with the charge, as perhaps more fully amplifying it. I am willing to give them, inasmuch as they are asked, and they contain general propositions of law."

It is not true, as stated by the Court, that the declarations of law were, in the main, covered by the charge. It is not true that they were abstract propositions of law, more fully amplifying the charge. On the contrary, the original charge contained vague, abstract and general propositions, whereas the instructions asked, and which were discredited and emasculated by the observations of the Court above quoted, were pertinent, specific and sound. Your Honors' experience will enable you to realize without any comments from counsel how little weight, if any, these propositions would have, thus discredited from the bench.

We respectfully but earnestly ask the Court to examine the instructions which the defendant thus asked

(Rec. pp. 242–244), and see for themselves that it is not true that they laid down abstract propositions of law, but that the propositions stated were concrete, pertinent, applicable to the case, and directed the jury to the points on which the question of guilty or not guilty should turn.

We also ask the Court to examine the said instructions asked by the defendant in order to see that the statement of the trial Court that they had been in the main covered by the charge is a mistaken statement, and that the original charge did not direct the attention of the jury to the essential points which were included in these instructions asked by the defendant, and therefore the Court did the defendant a great injustice in characterizing these instructions as abstract and general and in stating that they had been covered by the Court's charge.

The instructions asked by the defendant were right or wrong. They ought to have been given without any discrediting qualification, or they ought to have been refused; so that the defendant could have the full benefit of the instructions if correct, and the full benefit of an exception if they were correct and were refused.

The error committed by the Court in thus discrediting and emasculating the instructions would be bad enough in a civil case, but in a criminal case, where the reputation and liberty of a citizen are at stake, such an error ought not to be tolerated. No one can measure its effect upon the jury. *This error the Court persisted in and refused to correct.* (See, specially, Record, page 252).

A further observation is, that if it was proper to give those instructions, then the Court ought to have taken

the case from the jury, because they covered the whole ground of alleged guilt. That these instructions asked by the defendant had no effect on the jury is evident from their communication to the Court when they returned on the following Monday (Record, p. 246). The juror's inquiry related to such services as Burton *did render before the Post-office Department in the five visits*, and the Court's answer shows that it entirely mistook the juror's inquiry. The juror had in mind the lawful and proper visits of the Senator to the department having no reference to a fraud order, but the Court assumes that the services rendered in those five visits were criminal and left only to the jury the question whether he received pay for what he did in those five visits, saying as follows (Record, p. 249):

"In other words, as I said before, the gist of the complaint is rendering services for compensation, and therefore the bare fact that he should be employed and had the right to go before the department to render services does not excuse him provided he receives compensation for those services. I think this will make it clear so far as the first part of the inquiry is concerned, that *in order to excuse* the Senator from *anything he did before the department in rendering services* you must find he did not render those services for compensation, in accordance with the language of the charge, or that he did not receive compensation for those services. *If he received compensation for those services he is guilty under the law.*"

This fatal charge assumed that the visits and services were prohibited and were of the character charged in the indictment, and the assumption is not true.

So the Court equally mistook the second question put by the juror. The Court said (Record, p. 250):

"You can see plainly that the bare fact that service was rendered before the department in the way charged in the indictment might be the very reason why there

would have been in this case the report that there was nothing in the thing which was being investigated."

This mistakes the *facts* in the case, as will appear by the chronology which we give in our main brief, at pages 227, 228.

Then the Court proceeds (Rec., 250) :

" The very thing which is before the jury to be considered is whether there was *anything* pending."

This is not the very thing. The very thing is, did the defendant render services to prevent the issuance of a fraud order with knowledge that the Evans and Hout charge was pending, and seek to get a favorable decision.

It is perfectly obvious that it was this additional charge that brought about the conviction. It practically cancelled everything that took place before. The Court refused to call attention or to allow counsel to call attention to the defendant's requests, which it had discredited and emasculated as above stated, when they were asked (Rec., 252). And to force the concurrence of the jury in a verdict of guilty, the Court said (p. 251) :

" Counsel for the *defense* in case of a conviction will have full opportunity of submitting the matter to other tribunals to determine what is the true law upon the subject."

We are here to have this promise redeemed. From one end of this additional charge to the other there is *no reference whatever to a fraud order or services to prevent the issuance of a fraud order,* and no statement by the Court that the defendant could be convicted only in case he rendered services to prevent the issuance of a fraud order.

On the contrary, the jury were expressly instructed

that if he performed the services which he did perform in those five visits, he was guilty, if he got paid for them.

The learned Solicitor General, in his supplemental and reply brief, refers to various parts of the original instructions of the Court, which he claims confined the inquiry of the jury to services to prevent the issuance of a fraud order. But the learned Solicitor General fails to take account of the fact that this additional charge of the Court had the effect of *canceling any such prior instructions.* And, moreover, as we have shown in the original brief, the learned Solicitor General is wholly mistaken in supposing that the Court, even in its original charge, confined the inquiry to services to procure a fraud order. On the contrary, as we have shown in our main brief, pages 229, 230, 231, 232 and 233, the Court's original charge, taken as a whole, did not so confine the attention of the jury to services in relation to a fraud order. Even if it were to be construed as doing so in the original charge or the discredited instructions which it gave, the effect of this was wholly nullified and canceled by the additional charge and the circumstances attending it.

We respectfully refer the Court to our main brief, POINT VII. (pp. 215–238), for fuller statement of this matter of the Court's error in its charge and additional charge to the jury.

VIII.

Concluding Observations.

The original brief, as well as the supplemental and reply brief of the learned Solicitor-General, contain

certain innuendos, insinuations, suspicions, epithets and mistakes of fact.

Lest absolute and entire silence with respect to these might be construed into an admission of their correctness or justice, we will briefly refer to some of them with slight comments.

On page 18 of the Solicitor-General's main brief occurs this language :

" McGowan was an Indian agent who had evidently been swindled by the Rialto Company and was threatening."

There is not a line or word in the record to justify this statement, that McGowan " had evidently been *swindled* by the Rialto Company." On the contrary, what little evidence there is bearing on this wholly immaterial matter goes to show that McGowan was trying to use his official position to blackmail the company.

In the main brief, page 20, the statement is made that the Rialto Company was the Brooks Company in another form.

The evidence plainly contradicts this. The Rialto Company was organized under the legal advice and direction of Judge Krum and Mr. Harlan on an entirely independent basis (see Record, pages 167, 169, 183).

On page 21 of the Government's main brief the Solicitor-General says :

" Burton, before he was senator of the United States, *if not afterwards,* had represented a certain Weltmer before the Post Office Department in a fraud order proceeding."

There is not one syllable of evidence in the record to support the insinuation that Senator Burton represented Weltmer before the Post Office Department after he was Senator, or that Weltmer ever had any matter before the Post Office Department after Burton was Senator, nor is such statement true in fact.

On page 22 of the main brief the Solicitor General says:

"Burton was to be paid $2,500, and, in fact, he received that sum in five monthly installments of $500 each, the termination of the arrangement being broached by Mahaney, the secretary of the company, immediately after Congress adjourned in March, 1903."

Two wrong impressions are conveyed in this statement: *First*, that the contract was to be for an entire stipulated amount, whereas the fact is that the contract was for $500 per month (see our Main Brief, p. 174 *et seq.*, where this is fully shown, and the fact is further shown that in any view Senator Burton performed no services before the Department for his "month's pay" of $500 handed him in cash in St. Louis, March, 26, 1903); and, *Second*, that Burton, and not Mahaney, terminated the employment is proven not only by Burton's statement, but even MacRae said that Mahaney told him that Burton had resigned, and Harlan said that Mahaney told him that Burton had terminated the contract (see Record, pages 162, 189, 224).

Again, on page 29 of the main brief, is this statement:

"But it is evident, from Harlan's cross-examination, that Mahaney was not mistaken, because, while Harlan insisted that the reason given by Mahaney was not given at the conference on December 24, he admitted that, at his next conference with Krum, the latter suggested that probably Burton had better not

appear, because that might detract from his influence at Washington, and Harlan disagreed with that view."

The foregoing is a most glaring mistake. The learned District Attorney put the substance of the foregoing in the form of a question to Mr. Harlan, and his answer was "No, sir" (see page 186 of the Record).

This question relates to what Harlan testified to before the Grand Jury. Harlan, some time after the indictment against Burton, was called before the Grand Jury for the purpose, as counsel says, of pumping him.

Respecting the reason why Senator Burton did not appear before trial after having gone over the case most carefully with his client first at Washington and then with his associate counsel later at St. Louis, Mahaney testified willfully false, or else Judge Krum, Mr. Harlan and Senator Burton testified willfully false (Krum's testimony, Record, pp. 227, 228; Harlan's testimony, p. 177; Burton's testimony, p. 224). There is no room to harmonize these contradictions. All three of them contradict Mahaney and discredit his testimony.

In the reply brief (page 18) occurs this language:

"Since these books were part of the Rialto Company's plant in their illegitimate business, and as they appear to have embraced records or lists of addresses in that business all over the country, they might have been a very material aid to the government inquiry on the fraud order."

The Solicitor General is bold in continuing to call the Rialto Company's business illegitimate, but he is bolder still when he attempts to say what these books and records were of the Brooks Brokerage Company, for the record is entirely silent on that proposition.

Again on the same page (18) occurs this language :

" The case against Dennis out of the Brooks Company business in the federal court, it is true, was over, but federal indictments were pending against MacRae, Garland and Dennis, growing out of the business of the Rialto Company " (page 197).

Referring to the record, it will be seen that the trial Court excluded all evidence as to whether indictments had been found against the above named parties, or when these were found. This statement of the Solicitor General is not supported by the record. If we were to say that indictments against these parties were found in the month of December, 1903, many months after Senator Burton's contract of employment had terminated, that Dennis, from the time of said indictment, was continuously in St. Louis up to the middle of the following April, when he died, was never apprehended or arrested, although he was frequently in the presence of the officers of the Federal Court, and that he never heard of any indictment against him in the Federal Court by reason of his connection with the Rialto Company until at the time of the trial of this case; and further, that Mahaney and MacRae were indicted in order that they might testify in this case with a rope around their necks, and that they have never been brought to trial down to this date, all this would be strictly true.

On page 19 of the reply brief occurs this expression :

" All of the ways in which Senator Burton kept the department in good humor with Dennis doubtless do not appear in this record."

That this statement has nothing but suspicion for a foundation will readily appear when it is remembered

that during the entire time Senator Burton was attorney for the company he never heard that the company had any trouble with the department; he never heard of any complaints except the first two, and there was nothing to keep the department in a good humor with Dennis excepting to try to prevent friction because of the action of Mr. Dice respecting the books.

The Solicitor General, all through his brief, in his discussion of the facts, seems to give the impression that the Post Office Department is complaining against Senator Burton because he used his influence in preventing that department from doing its duty. How absurd when the facts are remembered.

The Rialto Company was organized on September 2, 1902, and during its entire existence had its offices under the shadow of the Postal Department as represented by Inspector Dice.

On November 14 the Hout and Evans complaints were examined by an inspector and reported nothing in them (Rec., pp. 70, 202). And then in July and August following, after a full examination of the company, it continued to run, and Mr. Dice thought it was in existence and doing business at the time of the trial of this case in March, 1904, wherein he testifies:

"Q. When did the company go out of business? A. The Rialto Grain & Securities Company?

"Q. Yes? A. I do not know that it is out of business.

"Q. Has not it been out of business for a good many months? A. I do not understand so."

Record, pages 72, 73.

Now, when no recommendation for a fraud order was ever made against this company, and no fraud order was ever issued against this company, is it not unjust for counsel to contend that this was because of any-

thing that Senator Burton ever did. And does it not conclusively show, further, that the Post-office Department was guilty of great negligence to say the least, or that it was satisfied that the Rialto Company had done nothing for which a fraud order ought to issue against it.

This matter of the breaking up of the Rialto Company, which is all in the mind of the Honorable Solicitor-General, and not in the record, is referred to on his main brief, page 35, as follows:

"During the following summer the investigation upon the additional complaints which had come in against the Rialto Company was pursued vigorously and thoroughly, and this, in connection with the state's activity, resulted in thoroughly breaking up the company."

There is not a line or sentence in the entire record with reference to anything that the State did do or did not do against the Rialto Company, and that the Solicitor-General is mistaken about the breaking up of the company is conclusively proven by his own witness, Inspector Dice, to which we have referred above.

Counsel tries to make something of the destruction of two letters that both Harlan and Burton state had absolutely nothing to do with the case, but were of a personal nature. In this connection it seems the Solicitor General forgets that every letter in this record, both those written by Burton to Harlan and those written by Harlan to Burton, except the one of February 11th, were in the hands of Senator Burton for a period of 24 hours after he was indicted, and were in the hands of his attorney, Judge Krum, and were by his (Burton's) knowledge and consent turned over to Col. Dyer, U. S. District Attorney at the time that he was

examining or rather, pumping Harlan before the Grand Jury, and that there would be no letters in this record except for the voluntary action of the defendant, with the single exception of the letter of February 11th.

Immediately upon Senator Burton's indictment he proceeded to St. Louis at the earliest possible moment, and not only voluntarily turned over all letters, with the exception of the letter of February 11 (which was not in his possession), which were afterwards introduced against him by the Government, but he also went upon the stand and testified fully and freely as to all his connection with the Rialto Grain and Securities Company, and as respects all the several interviews with Cochran, the chief inspector, and the Government's main witness. He did not conceal anything or attempt to conceal anything in all this trial. He was not contradicted in any point or matter by Cochran, and not in any material matter by even Mahaney or MacRae or any one else. The insinuation on the part of the Solicitor General that Senator Burton concealed anything or undertook to conceal anything is wholly gratuitous and is not supported in any respect, except by the discredited witness, Mahaney, in matters having no reference, however, to a fraud order. Mahaney and McRae were indicted and testified on this trial as witnesses for the Government, and neither of them has ever been brought to trial by the Government, and hence we felt justified in saying above that they testified with a rope around their neck.

On page 16 of the reply brief, this statement is found:

"In Burton's reply of December 9th [page 136], in saying that no instructions whatever about the Rialto

Company have gone out from the Department, he manifestly means that a fraud order had not been issued."

What a strange construction is this? A fraud order by its very nature and operation is public, and the very first persons to know of its issue are the Post Master at St. Louis and the Rialto Company whose mail is stopped. And further, Cochran says that there, was never any talk with him by Burton about a fraud order; not a word at any time passed between them on that subject. If Burton had talked or communicated in any way with any other departmental official, it would not have escaped the vigilance of the Government, and the zeal which has characterized this prosecution against Senator Burton we may be sure would have placed that official on the witness stand along side of the several officials of the Post-Office Department on both sides of the Alleghenies who did testify for the Government. The prosecution moved heaven and earth to secure a conviction, and it is perfectly certain that if any official of the Post Official Department other than the witnesses produced on the trial had been visited or spoken to by Burton they would have been taken to St. Louis to testify.

On page 15 of the supplemental and reply brief is the following statement:

"Mr. Price does not seem to have been a very vigilant or thorough inspector."

It is no part of the duty of counsel for Senator Burton to defend Mr. Price or the post-office officials either in Washington or St. Louis. Apparently, however, this and other insinuations of the Government's

counsel against the post-office inspectors has no more foundation than the like insinuations against Senator Burton. What justification is there for the statement that Price was not a vigilant or thorough inspector? The record shows that on the 7th of November the Hout and Evans complaints were sent out from Washington to St. Louis. They reached Dice on the 10th of November. They were promptly handed to Price for investigation. They were promptly investigated and a report made November 14 that there was nothing in the complaints. No complaints other than the Hout and Evans were ever filed. The letters of Fravel, Allen and Warner were not complaints at all. Dice's zeal for the Government is manifest throughout this case.

The important thing to be here observed is that, so far as the complaints against the Rialto Company were concerned, they had all been remitted under the rules and regulations of the Department from Washington to St. Louis. Burton, although several times in St. Louis during the time of his employment, never saw Dice or Price or any official of the Post-office Department, and it is not pretended that he did. The matter having been referred from Washington to St. Louis for investigation, and all the papers sent to St. Louis, there was nothing in the department at Washington or any data for an investigation, and it appears by the undisputed testimony of Cochran and Burton that the matter of any complaints against the Rialto Company or the issue of a fraud order was never discussed, never spoken of or in any manner mentioned between Burton and Cochran or any other official of the Post-office Department.

Yet, in view of these undisputed facts, we meet with

the following extraordinary, wholly unjust and most unfounded statement of the learned Solicitor-General in his supplemental and reply brief (page 41):

"Burton's traces were well covered. His assertions on behalf of himself and his client make a fair outside, but he held up the investigation because he was Senator and not only because he was General Counsel of the Rialto Company, and the force of the Judge's charge animadverted on at the bar were perfectly accurate and just. If not, the most dangerous evil in this entire situation—namely, that intangible, subtle and insidious thing, 'influence,' can never be reached even where the receipt of compensation can plainly be shown."

We pronounce as utterly unfounded in this record, that any investigation was "held up" because of Senator Burton's employment by the Rialto Company, or even held up at all. The learned Solicitor-General does not seem to realize that in making such a statement he is villifying the post office officials. Who are the guilty post office officials? And why does not the Department of Justice busy itself with trying to bring them to justice?

The post office officials have shown no lack of zeal in the prosecution of Senator Burton. They indicted him 1,200 miles away from the place where the alleged services were rendered. They had all the power and force of the Government to take their witnesses from beyond the Alleghenies and other parts of the country to support the charge, leaving Senator Burton with his own unaided resources to get his witnesses at this distant place of trial, if he was able to do so, and to support the burden and costs of his defense. He tried to get the Postmaster-General as a witneas and failed, because St. Louis was too far away from Washington.

If the present insinuations of the Solicitor-General are true, that the investigation was "held up" by the post office officials by reason of Senator Burton's "influence," let the Department of Justice manifest the same zeal with which they have prosecuted Burton and bring them to justice. This brief abounds with charges of swindling and fraud on the part of the Rialto Company and its officers, and the curious result is presented that no "fraud order" has ever been issued against the Rialto Company and no indictment against its officers ever brought to trial. The energy of this prosecution, for some reason inscrutable to us, seems to have been directed with all the zeal, force, power and resources of the Department alone against Senator Burton.

The Court will bear us in mind that in opening this case and in the argument at the bar we refrained from making any observations as respects the nature of this prosecution, and we only make these in answer to the unjust and unwarranted statements in the brief of the learned Solicitor General.

Moreover the learned Solicitor General seems to be unconscious that the statement on page 41 of his brief, that "Mr. Burton's traces were well covered," is practically a confession of the fact that the prosecution has been unable to prove the allegations of the indictment. The Solicitor General's words mean this, if they mean anything of importance.

So likewise his statement (page 41), that

> "If not, the most dangerous evil in this entire situation, viz., that intangible, subtle, and insidious thing, 'influence,' can never be reached even where the receipt of compensation is plainly shown,"

is a confession that the prosecution has been unable to show any "services" and they want the defendant

convicted, not for "services rendered" as alleged in the indictment, but for the exercise of "that intangible, subtle, and insidious thing, influence."

We thus have the most surprising situation that, although Cochran, the only Government witness to prove the charge in the indictment, testifies that from the beginning to the end there was no discussion between him and Senator Burton as to the issuance or non-issuance of a fraud order, the Government wishes to insist on a conviction because of the existence of what the learned Solicitor-General calls "that intangible, subtle and insidious thing, influence," which was supposed to have been exerted in reference to a mythical matter, to wit, the existence of a fraud order inquiry at the time in the Department at Washington.

Of course, a complete answer to this extraordinary position of the Solicitor-General is that the statute prohibits "services" and nothing else, and even if "influence were within the statute," it would still be necessary for the Government in a prosecution to prove the exercise of influence, and on this record it stands uncontradicted that the only Government witness (Cochran), whom Senator Burton visited or saw, denies that the question of the issuance of a fraud order was ever discussed or considered.

Possibly in the light of this extraordinary position of the Solicitor-General, we are able to get a glimpse of the reason why the Solicitor-General states in his brief, and why the learned Judge on the trial below, stated that the receipt of compensation is the gist of the offense; for certainly no services of Senator Burton to prevent the issuance of a fraud order were proved

or could be proved, and, therefore, the only hope of their being able to convict Senator Burton was to regard "influence," not proved but imagined by the prosecution, as within the statute, and, therefore, they stated that if he received compensation he was guilty.

On page 18 of the reply brief the following statement is found:

"It was safer to have the books back in the Rialto Company's possession, and Burton appears to have secured their return by his persistence."

Burton did no such thing. He did not ask even that the books be returned to Major Dennis. He was perfectly willing that the Government should retain their possession. What he did do was to protest against their being turned over to the State authorities after the Government was through with them. Respecting this matter Burton testified as follows (Record, page 222), and there is no contrary testimony:

"I showed him [Cochran] this telegram, and he expressed surprise at that part of it which said 'Col. Dyer told me he had no further use for them,' and said he would look into the matter at once. I told him that I knew nothing about the matter further than he did, but that if Mr. Dice, or Col. Dyer or the Government or anybody connected with the Government wanted to keep these books there was no objection, as far as I knew, and if there was, I would not urge any objection. But, unless he could give me some reason why they should be turned over to the State authorities, it would seem that that was not fair and right."

Doubtless it was because Dice still persisted in keeping possession of the books that Burton used the expression in his letter "I have tried to keep the Depart-

ment in a good humor with Dennis." It could have referred to nothing else, for there was nothing else in the Department to which it could refer.

Moreover, the statement of the learned Solicitor General that "Mr. Burton appears to have secured their return by his persistence" has no foundation in the record. So far as the record shows, the books were never returned by Dice to the Rialto Company or Dennis, and are in Dice's possession still.

On page 20 of the reply brief, the learned Solicitor General says, referring to the two letters Harlan returned to Burton: "What does it ordinarily mean when letters are destroyed?—that the person procuring their destruction is conscious of doing something wrong, * * * a confession that he had done wrong and violated the statute."

This interpretation makes Harlan a perjurer as well as Burton, for they both say the letters did not relate to the Rialto Company in any way.

And there is nothing to contradict their testimony or to make it in the least improbable.

The learned Solicitor General, in his supplemental and reply brief, page 20, referring to the interview in St. Louis on March 26, between Burton and Mahaney, when Burton's employment was terminated, says:

"Burton says himself there is nothing pending in the Department of a serious nature against the company; that the situation there is cleaned up."

In reference to this we have to observe as follows:

1. If any such words were used, it will be seen, by

reference to Mahaney's testimony (page 120) and MacRae's testimony (page 162), that these words were used by Mahaney and not by Burton, and, therefore, the Solicitor General is incorrect when he states, on page 20, that Burton "says himself there is nothing pending in the Department of a serious nature against the Company; that the situation there is cleaned up."

2. If, however, these words are to be regarded as what Mahaney said in Burton's presence, it is to be noted that the Solicitor General is utterly inconsistent in his theories, for he states that there was this matter of a fraud order pending in the Department at Washington, and that Burton knew it, and yet he is insisting that Burton, Mahaney and MacRae are all agreed in the fact that everything is cleaned up; in other words, that there was no fraud-order inquiry pending at Washington.

3. As a matter of fact, there were certain matters in respect of which Senator Burton had visited the Department, namely, the question of the Dennis indictment, which had been cleaned up by the acquittal of Dennis; also the question of whether or not Bowman and Shove were inspectors; also the McGowan matter, and the matter of the books of the Brooks Brokerage Company; and the words "cleaned up," if they were used, applied to these various matters.

Confirmatory of this, we call attention to the following from Mahaney's testimony (Record, page 121):

"COL. DYER: Q. Was there anything said in that conversation about complaints that had been referred to the Post Office Inspectors here for examination? A. I do not think there was. I do not recall."

It is an undisputed and indisputable fact on this record that not a word was written and not a word

spoken by Senator Burton to Cochran or any official of the Department about the complaints of Hout and Evans after Harlan in his letter of November 22 (Record, page 175) wrote Burton that they had been examined by the post-office officials and they had found nothing in these complaints and had made a *report in favor of the Rialto Company in respect of them.*

On this vital and important and in Burton's favor controlling point, Burton and Cochran both concur.

This brief on behalf of Senator Burton is purely in reply to the supplemental reply brief of the United States filed since the argument. This brief of ours is in no sense a substitute for *our main brief* and *our supplemental brief* already filed, to which we beg the Court's careful attention, but is merely to correct certain errors into which the learned Solicitor General has fallen and in reply to some of the new suggestions which he has made.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
W. H. ROSSINGTON,
FRED W. LEHMANN,
For Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOSEPH RALPH BURTON, PLAINTIFF in error,
v.
THE UNITED STATES.
} No. 343.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Plaintiff in error was indicted on January 23, 1904, for violation of section 1782 of the Revised Statutes, in that, being a Senator of the United States, he received pecuniary compensation from the Rialto Grain and Securities Company, of St. Louis, Mo., for services rendered by him to the company in a certain matter pending before the Post-Office Department in which the United States was directly interested.

The indictment contained nine counts (Rec., pp. 3–18). The first count charged as follows:

> That on the 26th day of March, A. D. 1903, at the city of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, the said Joseph Ralph Burton, Senator as aforesaid, did unlawfully, knowingly, willfully, and corruptly take, accept, and receive from the Rialto Grain and Securities Company (a corporation duly organized under the laws of the State of Missouri) the sum of five hundred dollars lawful money of the United States, of the value of five hundred dollars (the particular kinds and denominations of which are to the grand jurors aforesaid unknown), as compensation for the services of him, the said Joseph Ralph Burton, Senator as aforesaid, theretofore, to wit: On the 22d day of November, A. D. 1902, and on divers other days between said last-mentioned date and the said 26th day of March, A. D. 1903, rendered by him, the said Joseph Ralph Burton, Senator, as aforesaid, to the said Rialto Grain and Securities Company before the Post-Office Department of the United States, in a certain matter then and there pending before said Post-Office Department, in which the said United States was directly interested, that is to say, whether the said Rialto Grain and Securities Company had violated the provisions of section 5480 of the Revised Statutes of the United States, in that it (said company) had through its officers, agents, and servants devised a scheme and artifice to defraud, which was to be effected by said Rialto

Grain and Securities Company, through and by its officers, agents, and servants, in opening correspondence and communication with divers persons resident within the United States, by means of the Post-Office establishment of the United States, and whether said Rialto Grain and Securities Company, by its said officers, agents, and servants in and for executing said scheme and artifice to defraud, had placed or deposited any letter or packet in any post-office of the United States, to the end and for the purpose of enabling the Postmaster-General of the United States, in pursuance of the authority vested in him by law, to ascertain, find, and determine from the evidence satisfactory to him, the said Postmaster-General, whether he should order and direct the postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain and Securities Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by section 3929 and section 4041 of the Revised Statutes of the United States, as amended by the act of Congress of March 2, 1895), any and all letters addressed to said Rialto Grain and Securities Company, and sent to or through the post-office at St. Louis, Missouri, by means of the Post-Office establishment of the United States.

And the grand jurors aforesaid, on their oaths aforesaid, do further present that the services so as aforesaid rendered to the said Rialto Grain and Securities Company by the said Joseph Ralph Burton, Senator as aforesaid, consisted in part of visits to the said Postmaster-General,

the Chief Post-Office Inspector, and other officers of the Post-Office Department of the United States, and of representations and statements made to the said Postmaster-General, the said Chief Post-Office Inspector, and said other officers, which said visits, representations, and statements, so as aforesaid made by the said Joseph Ralph Burton, were made with a view and for the purpose of inducing said Postmaster-General, the said Chief Post-Office Inspector, and said other officers to decide the question so as aforesaid pending before said Post-Office Department in a manner favorable to the said Rialto Grain and Securities Company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

The second count differs from the first count only in alleging that the matter pending before the Post-Office Department was one in which the United States was *indirectly* interested.

The payment is charged in the third count to have been made by "W. D. Mahaney, an officer and employee of the Rialto Grain and Securities Company;" in the fourth count by Hugh C. Dennis, and in the fifth count by W. D. Mahaney, "an employee of Hugh C. Dennis."

The sixth, seventh, and eighth counts charge the payment on various dates of checks for $500 each, drawn by the Rialto Grain and Securities Company by Hugh C. Dennis, president.

The ninth count charges a further payment of $500,

by check of said company, by W. D. Mahaney, vice-president.

Defendant was arraigned in the district court of the United States for the eastern district of Missouri, pleaded not guilty to the charges contained in the indictment, and was admitted to bail (p. 19). The plea was subsequently withdrawn and a demurrer to the indictment filed on the grounds that upon the facts stated in the indictment the Postmaster-General had no authority to make an order forbidding the use of the mails to the company, and that no matter or thing was pending before the Post-Office Department in which the United States was interested within the meaning of section 1782. The demurrer was overruled (p. 21), the opinion of the court thereon appearing at pages 279–285 of the record.

Before the trial was commenced, and at the request of the district attorney, the court ordered that the indictment be dismissed as to the fourth and fifth counts (p. 22).

The case was called for trial March 22, 1904, defendant pleading not guilty, and on March 28, 1904, the jury returned a verdict of guilty as to counts 1, 2, 6, 7, 8, and 9 of the indictment, and not guilty as charged in count 3 (p. 24).

Defendant moved for a new trial and in arrest of judgment, the motion in arrest setting forth, among other things, that the privilege of freedom from arrest granted to defendant during the session of the Senate was a prohibition against arrest or judicial proceedings

which could not be waived by him (pp. 25, 278). The motions were overruled by the court. Thereupon the district attorney asked the judgment and sentence of the court upon the verdict of guilty as returned by the jury, and sentence was pronounced of a fine of $2,500, with imprisonment for six months (pp. 25–26).

At the commencement of the trial counsel for defendant requested a larger number of jurors for the purpose of peremptory challenges, on the ground that the offense was infamous. This request was refused, the court ruling that the offense was a misdemeanor, and that the challenges should be limited to three on each side (p. 27).

The following facts appear from the testimony of the witnesses and from the documentary evidence introduced: That during the period between November, 1902, and August, 1903, the Post-Office Department was conducting an investigation, growing out of complaints received from various sources, to ascertain whether the Rialto Grain and Securities Company had devised a scheme to defraud, and was unlawfully using the United States mails to that end (pp. 57, 58, 70, 71, 72, 203, 204); that during the greater portion of the period in question Senator Burton was acting as counsel for said company under an agreement that he should receive the sum of $2,500 in compensation, paid in monthly installments of $500 (pp. 80–85, 91–93, 94, 173); that services were actually rendered to the company by defendant in connection with the matter then pending

before the Post-Office Department, consisting in part of visits to the Department for the purpose of making inquiries and receiving information, arranging for a hearing if such should become necessary, and in general making representations in favor of the company (pp. 94, 118–119, 135–139, 140); that the four checks mentioned in the sixth, seventh, eighth, and ninth counts of the indictment were mailed by the company to defendant in Washington, and were deposited by him in the Riggs National Bank, of Washington, D. C. (pp. 106, 107). It was also stipulated by counsel, the stipulation being read in court in the course of the trial, that these checks were duly received by the defendant in Washington, D. C., were indorsed by him, and deposited with the Riggs National Bank, and were afterwards duly paid by the Commonwealth Trust Company at St. Louis, Mo. (p. 111).

Being in doubt as to the correct method of review, defendant first sued out a writ of error from the circuit court of appeals for the eighth circuit and thereafter presented a petition to this court for a writ of error to the district court of the United States for the eastern district of Missouri, which was allowed July 9, 1904. A petition for writ of certiorari to the circuit court of appeals has also been filed, although not yet passed upon by the court.

THE STATUTE AND ITS HISTORY AND PURPOSE.

Section 1782, Revised Statutes, provides:

> No Senator, Representative, or Delegate, after his election and during his continuance in office,

and no head of a Department or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any Department, court-martial, bureau, officer, or any civil, military, or naval commission whatever.

Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States.

This statute was drawn from the act of June 11, 1864, the language of which is substantially the same. The bill, as originally introduced, contained additional and more stringent provisions, making it an offense for a member of the Senate or House of Representatives to act as counsel, with or without compensation, in any court, in a cause in which the United States was a party or directly or indirectly interested, or to receive compensation of any kind for services of any description rendered by himself or another in relation to such cause or proceeding. These provisions were subsequently stricken out, and with the insertion of

the words "court-martial" and one or two other unimportant changes, the bill was passed after a short but spirited debate in the Senate. Although the remarks related mainly to the proposed amendment which prohibited members from practicing before a court-martial, it is quite evident from what passed in the course of the debate that the attention of Congress had been called generally to the evils resulting from the unrestricted practice of Senators and Representatives before the Departments, and had in mind specific instances showing that undue and improper influence had been exerted, especially in regard to claims pending in the Departments and before the bureaus of the Government. (Congressional Globe, Thirty-eighth Congress, first session, pp. 555–561.)

This act was passed in obedience to the just demand for a strict view of the relations of legislators to the executive branch of the Government. It needs no argument to show that the spirit of this law was always a moral rule of the highest importance for the guidance of members of Congress, to which every high-minded man, sensible of his duty and sensitive as to his honor, must at all times have bowed. It is too plain for words that when the free intercourse of necessity existing between the members of Congress and the heads of the executive administration of the Government is considered, and the proper influence relative to the interests of their localities and their individual constituents exerted by members of Congress is regarded, the taint of hire and every mercenary

consideration should be excluded. It was and is the only way to insure, as far as possible, honesty and freedom from all corrupt motives and interested personal objects in the public service.

It might be said that this statute attempts to erect a mere impropriety into a crime; that the line between true and legitimate representative service in the Departments and that which is forbidden is difficult to draw, and that many legislators in honest ignorance of the law or of its meaning and scope have done precisely what the accused did in this case. The reply to these suggestions is that it is the province of the legislature to define crimes, and the impropriety aimed at here is so gross and palpable that when it became a misdemeanor under the law it was high time that this result should be attained. As the moral sense of a community or nation becomes more sensitive, many things which were regarded as merely venial or improper have gone over into the category of definite offenses against the law. For instance, only exceptional people here and there during the eighteenth century in England thought that the corruption of the electorate was a very serious matter, and consequently statesmen of eminence, like Walpole, openly and shamelessly bribed boroughs and communities by wholesale. But by the time the reform sentiment culminating in 1830 took definite shape in legislation, the legislators of England wrote into her law very salutary provisions on that subject, and although it is possible that further steps in the same direction remain to be

taken there as well as here, bribery of electors and the bribery of public officers is now recognized everywhere as one of the most serious of offenses.

As to ignorance of the law, surely legislators are the last men who ought to plead that. And it is safe to say that, irrespective of any exact knowledge of this law, every legislator who has a just respect for his own personal character and a proper view of his public duties, instinctively would refuse to serve any individual or interest before a Department of the Government for compensation. It is very certain that the accused here knew of the law, because he accentuates the fact that the law puts a prohibition upon him in the testimony as to what occurred on the train and in the testimony as to his conversations in his committee rooms with Chief Inspector Cochran. The truth of it is that the accused knew the law well enough, was willing to take chances on "sailing close to the wind," and went much too far. It is true that here and there he protests that he will not violate his duty as Senator, but he protests too much. He was so conscious of his duty and the law, and yet so desirous of this employment and its earnings, that he blows hot and cold. His position is unmistakable and characteristic of all men who allow themselves to tamper with the highest standards of conduct.

When this law was first enacted (June 11, 1864), it was proposed in the bill as introduced to forbid members of Congress from practicing even before the courts in any case in which the United States was a party or interested. The bill in that respect perhaps went too

far. At all events, it aroused strenuous opposition, as shown by the debates, and therefore was finally passed *in invitum*, so to speak. (Congressional Globe, Thirty-eighth Congress, first session, pp. 555–561.)

If, then, it be true, as seems reasonable to say, that the law was extorted, as it were, from an unwilling and protesting spirit in Congress by the better sentiment, then all the more it is shown that it was necessary, and that it does not go too far.

ASSIGNMENTS OF ERROR.

There are forty-three assignments of error (XLIV as numbered, but XXXVIII was inadvertently omitted). The specifications present only four propositions of law for discussion. Beside the mere formal assignments (III, IV, XLII, XLIII, XLIV) certain other points raised may be dismissed with brief reference before the real questions are stated.

Thus, as to Specification II, regarding peremptory challenges (p. 253; see Rev. Stat., sec. 819), the trial court's ruling (p. 27) that the challenges should be limited to three on each side is sound, and the reasons therefor conclusive (p. 286, on motion for new trial):

> First. There was no error in refusing to permit the defendant ten challenges. Section 1782, under which the indictment was found, denominates the offense as a misdemeanor. Therefore section 819 of the Revised Statutes, as interpreted by *Bannon and Mulkey* v. *United States*, 156 U. S., 464; *Reagan* v. *United States*, 157 U. S., 303; *Harrison* v. *United States*, 163 U. S., 140, confers the right to three challenges only.

By all tests this is not an infamous offense, but a misdemeanor in name and nature.

The statute calls the offense a misdemeanor; the maximum punishment is two years' imprisonment and $10,000 fine. In all cases conviction works disqualification for office under the United States. The punishment imposed could hardly be called infamous, and the infamous nature of punishment does not raise an offense above the grade of misdemeanor and to the grade of felony. The word "felony" denotes at common law an offense working forfeiture of lands or goods, to which capital or other punishment might be superadded according to the degree of guilt. There is no inconsistency in that modern rule which holds that imprisonment in a State penitentiary with or without hard labor is an infamous punishment. (*U. S.*, v. *De Walt*, 128 U. S., 393; *Bannon & Mulkey* v. *United States*, and other cases cited *supra.*)

Finally, under the law relating to challenges (sec. 819, Rev. Stat.), it is only on the trial "of any other felony" than treason or a capital offense that the defendant is entitled to ten peremptory challenges. In other words, the kind or degree of imprisonment is not the sole test of felonies.

The sentence imposed, a fine and *six months' imprisonment* in a *county jail*, conforms to the distinction. (Rec., pp. 25–26).

Again, as to Specification XLI (p. 275), the refusal of the court to reiterate the defendant's requests to charge upon the jury's return for supplemental instructions, which requests had already been granted (pp.

242–244, 252), was entirely proper, as shown by the court (pp. 289, 291, 292), especially on the ground of seemliness and because the court had already, as just stated, given the instructions once "in connection with the charge, as amplifying the same," and because the jury returned for instructions only on two particular phases of the case:

> The court believed that by making special reference to those specific instructions [the defendant's requests which were granted] the jury's attention would have been improperly directed to *certain phases* of the total instructions, to the exclusion of the main and exhaustive instructions found in the charge itself (p. 292).

The assignments based on the admission of testimony object to the receipt of evidence showing that there were complaints against the Rialto Grain and Securities Company before the Post-Office Department and a pending investigation by the Postmaster-General (V–XIV); to the admission of the correspondence between Burton and Harlan and Mahaney (XV, XX–XXVIII); to the receipt in evidence of the checks paid to Burton by the company (XVI–XIX); to those portions of the court's charge which ruled substantially that the Postmaster-General is authorized to inquire as to the fraudulent use of the mails; that while such inquiry is pending a United States Senator is prohibited by law from taking any compensation for services rendered before the Department in the matter of such inquiry; that the United States was interested, directly and indirectly, in the pending inquiry as to

the Rialto Company; that if the jury find from all the evidence that such an inquiry was pending, and that the accused knowingly received compensation for services rendered before the Department with reference to that inquiry, he is guilty (XXX–XXXII).

Error is also assigned because the court treated the counts based upon the receipt of the checks (counts 6–9) as showing different offenses of the same kind, and not merely different statements of the same offense, as the receipt of the money paid (XXXIII, XXXIV); and because the court rejected the defendant's theory of the relations between the defendant and the Riggs Bank and as to the place of payment of the checks (XXXVI, XXXVII).

As to the additional offenses shown in counts 6–9, every time Mr. Burton received a new and additional payment of his illegal compensation, plainly he committed a new and additional offense. The trial court well says:

> The sixth count of the indictment relates to a transaction different from that involved in the first three counts which related to the cash payment of March 26, 1903. * * * *The elements* of the offense charged in this count are the same as those charged in the first and second counts.

The court's holding as to the seventh, eighth, and ninth counts was the same. I think this point may be dismissed without further argument, excepting the discussion *post* as to the place where the checks were paid.

Assignment XXXV complained because the court did not exclude evidence of "what was done by the defendant in the matter of McGowan, Bowman, and Shove." Burton's services in the Bowman and Shove episode were rendered at the Post-Office Department, and formed a part of that entire series of transactions, and will be referred to in our discussion of that main branch of the case. As to the McGowan matter, the court was eminently fair to the accused. McGowan was an Indian agent who had evidently been swindled by the Rialto Company and was threatening. Burton was proceeding to "smooth that out" at the Indian Office of the Interior Department. I quote the phrase as a colloquialism; it does not appear in the record; but that was what Burton was doing when he was stopped by a telegram by Mahaney, who had "fixed" the man or the matter at the other end. I may observe that Harlan, the company's attorney, thought that the conduct of McGowan, who was at St. Louis "making some claim," was "outrageous" and "disgusting" (rec., p. 196).

Judge Adams ruled out Burton's conversation with the Commissioner of Indian Affairs on this subject, on the ground that as the service or inquiry by Burton was in the Interior Department, and since Burton said nothing there about his relations to the Rialto Company, the incident was inadmissible (rec., pp. 133–134). Later, upon cross-examination, the court provisionally admitted testimony on the subject, but finally excluded it, as follows:

> The objection is sustained. I cut the question out on yesterday because it did not involve, so far as testimony went, any action or services rendered by the defendant in the Post-Office Department. I did it for the purpose of eliminating all foreign matters. (Rec., pp. 195–197.)

Now, I submit that obviously Burton could render services *in a matter pending in the Post-Office Department* by pursuing *some branch* of the same inquiry which *ran into another Department*—that is, by performing service in the same matter in another Department also. I submit that clearly the learned court was in error in excluding the McGowan incident, and that at least the defendant has nothing to complain of in the ruling upon that matter. So far, therefore, we need not further consider Specification XXXV.

Assignments XXXIX, XL object to the language of the court addressed to the jury when they returned for specific instruction on two points. I have already touched upon this episode in part in commenting briefly, but I think sufficiently, on assignment XLI. I submit without a word of additional argument that Judge Adams pointed out, with admirable lucidity and dignity and with an accurate sense of all the proprieties of the situation, the respective functions of court and jury, the duties and responsibilities resting upon the jury; and that he expounded clearly and soundly the law applicable. (Rec., pp. 246–253; and again at pp. 268–274.)

The foregoing analysis shows, I think, that the only important questions in the case are these:

1. Was there any proceeding, charge, or other matter or thing pending before the Post-Office Department in which the United States was directly or indirectly interested?

2. Did the accused render services and receive compensation in such a matter?

3. In reference to the place of payment of the money and checks, did the district court have jurisdiction?

4. Was it legal and competent for the accused to waive, as he promptly and voluntarily did, his personal privilege of exemption from arrest as a member of Congress?

THE HISTORY OF THE CASE.

Mr. Burton was introduced in November, 1902, to Dennis, the president, and Harlan, the attorney, of the Rialto Grain and Securities Company, an incorporated "bucket shop," making small speculative grain ventures their specialty for numerous "clients" all over the country. Dennis was a well-known operator of that kind, a trader and promoter, along with other lines of business. The company was in reality the successor of the Brooks Brokerage and Commission Company; was, in fact, the Brooks company in another form. It had the same officers, directors, and employees in part, the same offices, and the same plant, and was doing the same sort of business with the same customers. The Brooks company had been in well-deserved trouble because of the character of its business, and Dennis

had been, and was then, in trouble on that account. An indictment in the Federal court was imminent, and proceedings were anticipated against the Brooks company and its owners or officers in the State courts of Missouri. At that very time complaints against the Rialto company had been lodged with the Post-Office Department. An investigation by the Department was in progress, and soon thereafter Dennis and Brooks were indicted in the Federal court for violation of section 5480, Revised Statutes.

On the very day of Burton's introduction to Dennis and Harlan, he traveled to Chicago with Harlan and Kastor, the man who introduced them. On that journey the arrangement by which Burton became the counsel of the company and its representative before the Post-Office Department was made, and the unwilling witnesses (Kastor, rec., pp. 78, 91; and Harlan, pp. 167, 188) tell the story of the trip and inevitably disclose the real intent and understanding regarding Burton's employment. It is evident that in Kastor's mind at least the usefulness of Burton was suggested and the value of an introduction to the officers of the company emphasized, because Burton, before he was Senator of the United States, if not afterwards, had represented a certain Weltmer before the Post-Office Department in a fraud-order proceeding. It may be noted that the Weltmer case ultimately reached the courts, and was known in this court as *American School of Magnetic Healing* v. *McAnnulty* (187 U. S., 94).

On the train Harlan proposed that Senator Burton

become counsel for the Rialto Company, mentioning legal matters coming up in regard to the Brooks Company, the supervision of the company's "literature"—the "leaflets" and "booklets," and pamphlets like that on page 38 *et seq.* of the record, and the one called "Giant Oaks from Tiny Acorns Grow," referred to on page 52 and elsewhere, which were obviously and insidiously intended to stimulate the speculative craze in the company's dupes—this supervision to be for the purpose of seeing whether the literature violated the postal laws and regulations; in other words, whether there was a scheme or artifice to defraud. It was proposed that the Senator's name be placed on these advertisements as chief counsel, and in consequence it was placed there. Burton was to be paid $2,500, and in fact he received that sum in five monthly installments of $500 each, the termination of the arrangement being broached by Mahaney, the secretary of the company, immediately after Congress adjourned in March, 1903, and the final payment being made in cash at St. Louis on the 26th of that month. Something was said about Burton's acting as counsel on the indictment then feared, and which was afterwards found against Dennis, with Brooks, because of transactions of the Brooks Company. Burton said he could not act before the Departments. Harlan, seeking to emphasize the employment of Burton as general counsel only, accentuates a part of the conversation which referred to a proposed branch of the business as promoting railroads and marketing securities, but this never came to anything and was entirely "in

the air." If it meant anything at all it was a mere blind to give respectability to the company's operations and conceal and gild its real business.

Notwithstanding the emphasis on the supposed distinction between Burton's function as general counsel and any departmental services, Harlan is forced to admit substantially that the company had the right to call upon him for such services, as he was employed, and desired him to go to the Post Office Department at Washington and learn about the complaints and the case against Dennis, and understood his employment covered such service; that Burtion was the representative of the Rialto Company at Washington and was paid for it, although the company had no business at Washington outside of their Department interests.

Harlan further says that under the so-called contract made on the train, he would have felt free to call upon Burton to ascertain whether complaints had been made or post-office inspectors sent, leaving it to Burton's own judgment to determine whether he should make the request, whether he was to overstep the bounds of a Senator or not. It is evident that the matter of inquiry or service at the Department was fully discussed. Harlan testifies that Burton said: "Then if asked at the Department, I am safe in saying that it is the purpose of the Rialto Grain and Securities Company to comply with every rule and order of the Department." This inquiry was due to the discussion which grew out of Harlan's explanation of the operations of the company relative to violation of the postal laws under section 5480, Revised Statutes.

It was said to Burton by his friend Kastor, either on the train or elsewhere and previously, that Burton's knowledge gained in his connection with the Weltmer case before the Post-Office Department would be of advantage to the company. Notwithstanding the effort in the testimony to confine Burton's engagement to the duties of general counsel (whatever that may mean), and to show that he accepted the employment excluding the idea of appearing before the Departments, immediately after the Chicago trip Harlan wrote Burton confirming the engagement as counsel and referring to the proceedings against Dennis before the Federal grand jury growing out of the Brooks Company business, showing inevitably, though not in terms, why Dennis was compelled to organize the Rialto Company, manifestly to run the business of the Brooks Company under that name, because of the latter company's malodorous reputation and the attacks on him (Dennis) by the former owner of the Brooks Company (Brooks), who was finally indicted jointly with Dennis.

The fact was brought out in the record that not only was Dennis indicted because of the Brooks Company business, but that indictments were pending in the district court against Dennis, Mahaney, and McRae, growing out of the management of the Rialto Company.

In the letter Harlan, the Rialto Company's attorney, spoke of "our labors to save Dennis," and suggested that Burton inquire about the facts at the Post-Office Department, by which he would "perform a great

service for us" at this time. The inevitable revelation of the real nature of Burton's arrangement and services as provided for on the train comes out more strongly in Burton's reply to this letter. He called at the Department and found that there were two complaints there against the Rialto Company—"your company." He thinks the company should satisfy complaints; especially should this be the motto until the Brooks matter is entirely out of the way. This is highly significant of the standards of conduct in the minds of all these men and of their methods. They trade and thrive on the knowledge that individual losses are small, that a large percentage of losers do not "make trouble" for various motives, including shame at their own folly, that "kickers" can be put off or quieted in many ways without much cost, and finally when a certain residuum of complaints does reach the Post-Office Department, they seek influence and secure services which may effectively save them from disaster.

Burton arranged with the Department to be advised in case complaints of the company were made, and for hearing if one were necessary. He assured the Department that the company purposed to comply strictly with the law and to remain in harmony with them; he said that all the trouble arose from the Brooks Company, and that Dennis had succeeded and formed a new company which had taken over the business of the old company. He said the new company was doing a straight business and was all right. In his letter stating this fact, he also informed Harlan that no action

would be taken without notice, and that an opportunity for hearing or explanation would be given. He closed his letter as follows:

> In return, if agreeable, you may make remittance for my first month's pay.

The expression "in return" is singularly unfortunate; not "by return mail," as he might have said, or, without any such expression, trusting to his client's promptness, but "in return," thus emphasizing the compensation as following immediately *in return* for the services rendered up to that point which he has just specified.

This case could be rested on the facts already shown along with the payment of that first month's pay which immediately followed.

On November 22 Mr. Harlan wrote to Mr. Burton again, and shows that the first claims or complaints against the Rialto Company had been investigated by the inspector, who made, as he is informed, a report in favor of the company. Thus he posts Burton instantly on that subject, advises Burton that he will be in Washington within a few days, and sends him a check for $500 "in return." Harlan says that he went to Washington to see Burton as counsel in the matter of the proposed indictment against Dennis; wanted to consult him to learn whether he could suggest anything to prevent the indictment. What occurred at the interview between Harlan and Burton at that time does not appear.

On December 2 and also on December 3 Harlan wrote Burton again. In the letter of December 2 he

informed him that Dennis, Brooks, and Garland, of the Brooks Company, had been indicted. He uses the words "we" and "us" as including Burton in one aspect and in another as showing that the Brooks people and business and the Rialto Company are identical. He anticipates that complaints against them will pour into Washington. He believes that locally "we will be able to control the situation, as this business has been pretty thoroughly gone over by the inspectors, and they understand just what we are doing and how we are doing it. At your end of the line you will of course use your own judgment in handling the situation. We will at all times be glad to observe any request made by the Post-Office Department, or to submit to any examination they may direct." Manifestly, this does not refer to Burton's representation of Dennis as an individual under the indictment for the Brooks business, but includes the current business and interests of the Rialto Company in the Post-Office Department.

In the letter of December 3 Harlan refers to a loser by the company, named Bowman, who represented himself at the St. Louis office as a post-office inspector and undertook to force a settlement "contrary to his just rights, and did succeed by reason of his representation in getting a little the best of the company." What a confession is this of their knowledge of transgression and proper fear of the law! He also speaks of another supposed inspector, named Shove, who was pursuing the same methods to recover his losses. He calls atten-

tion to this matter for Burton's information. The manifest connection between the Brooks case and indictments and the Rialto Company situation is again shown because the mails are bringing in letters inclosing newspaper clippings, but most of the letters are "fair," and "if the situation gets no worse * * * the Rialto Company will have but little trouble in getting through." Burton called at the Post-Office Department and made an inquiry about the persons falsely claiming to be inspectors, and obtained the desired information. He wanted to know if such persons were inspectors and if they were investigating the case. On December 9 he advised Harlan that Bowman was not a post-office inspector, "and by impersonating one has rendered himself liable to punishment;" that Shove also is a fraud, and that "there has gone from this office [meaning the Post-Office Department] no instructions whatever about the Rialto Company, and there is nothing in this office against you at this time. The matter in St. Louis, as you know, is in the hands of Mr. Dice there. * * * I will take care of things at this end of the line."

It could hardly have surprised the company and Mr. Burton that they had to deal with "frauds." Burton means, evidently, that there is nothing additional in the Department yet, because he is perfectly aware, as the letter shows, of the complaints already pending in the Department and in the hands of the St. Louis inspector.

On December 15 Burton, Dennis, and Mahaney met

in Washington. The indictment against Dennis was discussed. Burton asked about the conduct of the Rialto Company and the rules governing marginal trading. Burton took Dennis to the Post-Office Department, and said first that he wanted Inspector Cochran to meet Dennis and see what a fine man he was, and he repeated the assurance that the company was endeavoring to do a straight business, and also his former statement that all the trouble arose from the conduct of the Brooks Company. It was stated that they did not wish to antagonize the Department, and wanted to do exactly as the Department wished.

On December 24 there was a conference at St. Louis over the Dennis indictment and the Rialto Company affairs between Burton, Harlan, Mahaney, and Judge Krum, afterwards one of Burton's own counsel. Mahaney says it was agreed that Burton should not take part on the trial of Dennis, because that might show he was too much interested in the Post-Office feature of the case, and thus antagonize the Post-Office officials. Harlan and Krum say that Mahaney's statement is unfounded; that Harlan wished Burton to appear, and Krum suggested it would be a mistake to weight the case down with counsel, and Harlan accepted that conclusion. But it is evident from Harlan's cross-examination that Mahaney was not mistaken, because while Harlan insisted that the reason given by Mahaney was not given at the conference on December 24, he admitted that at his next conference with Krum the latter suggested that probably Burton had

better not appear, because that might detract from his influence at Washington, and Harlan disagreed with that view. Judge Krum's denial of Mahaney's statement was confined to the interview of December 24.

On January 24, 1903, Burton called again upon Cochran and asked that books and records of the company—manifestly a part of those they had inherited from the Brooks Company—which had been turned over to Inspector Dice in the investigation of the case before the Federal grand jury should not be turned over to the State courts for action there, as Dice proposed to do, Burton stating that these records had been surrendered voluntarily and it was a breach of faith on Dice's part to make that use of them, and asking that Dice be ordered to return the books. He was informed that Harlan should see the United States attorney, and that Dice would be governed entirely by the instructions of the latter. But Burton insisted that something be done at once, and the case was stated to an Assistant Postmaster-General, who declined to give the order; and the matter was then presented to the Postmaster-General, who evidently directed that the order be given substantially as asked for by Burton. The language of the telegram was excluded, although Dennis's trial was over long before the dispatch was sent, and it was offered for the purpose of showing the continuing relations that existed between Burton and Dennis and the Rialto Company.

In reference to this incident it further appears that on February 5 Burton received the telegram from

Harlan saying that Dice had delivered the company's books to the State authorities, where they were held subject to his order; that the United States attorney had no further use for them; and asking Burton to obtain an order requiring Dice to deliver them to the company. On the same day Chief Inspector Cochran saw Burton at the latter's office and at his request; Burton read this telegram from Harlan, and insisted that Dice was acting in bad faith in keeping the books, and thereupon Cochran promised to send a telegram of inquiry the next morning. Burton then said that he wished to appear in this and other cases before the Department, but did not wish to antagonize the Department—rather the other way; that he had incurred losses and could make money in that way and apply it to his debts; that other Senators had materially increased their income by such practice, and it was all right. He asked Cochran to warn him when he overstepped the bounds.

On February 11 Burton wrote Harlan acknowledging the telegram, saying that "things were satisfactory" between Harlan and Dice, and expressing the hope that Harlan would not let Dice "mislead you in any way." Apparently that was not jocular in intention, but it *is* humorous. Mr. Burton advised that he would be in St. Louis as soon as Congress adjourned, and added:

> Be sure and keep me advised if there is anything to do at this end of the line before going away. I have tried to keep the Department in

> a good humor with Major Dennis, and think I have succeeded. If agreeable, on receipt of this, I wish you would have my month's pay sent in so I can reach it by Monday next. (Rec., p. 139.)

On February 14 Mahaney telegraphs Burton: "Thanks for letters." He says a State investigating committee is asking for information; that Harlan says there is no occasion for anxiety; "all we want is unbiased investigation. Do you think you can do anything to help situation? Check mailed to-day." (Rec., p. 129.) Apparently Mahaney thinks the State investigation would stimulate the Federal investigation, and wishes Burton's aid so that the Washington situation should be controlled or quieted if possible.

It is curious to note how the report of service is immediately followed by a reminder that payment is due, and "in return" it is sent. This time, however, a further reminder is necessary, and so Burton telegraphed, on February 17, saying the "paper" had not arrived, and asking if it was sent; and Mahaney replied on the same date excusing his failure to send the check as stated in his message of the 14th, and saying "it was sent to you yesterday."

Letters of Burton to Harlan and of Dennis to Burton of January 19 and 22, respectively, were excluded from the evidence, and I omit further reference to the telegraphic correspondence of February 11 regarding the McGowan incident.

On February 25 Mahaney telegraphed Burton that it was reliably reported that two special inspectors had

been appointed "to investigate us" and report to the Postmaster-General, asking Burton "to verify and advise at once." To this Burton replied on the 27th: "No complaint in the Department against you. Will write full particulars by to-night's mail." That letter from Burton with another was destroyed at his request.

Mahaney was the doubting partner regarding the value of Burton's services. About the date when Congress adjourned, he became impressed with the necessity of reducing fixed charges. Burton appeared at St. Louis on March 26. Mahaney says that on the occasion of his visit there on that day "the attitude of the Department toward the Rialto Grain and Securities Company was discussed at great length, and I stated to him * * * that as far as my knowledge went there was nothing pending of a dangerous character at that time against the Rialto Grain and Securities Company, and he agreed in that opinion."

> The COURT: Pending where?
>
> A. In the Post-Office Department at Washington. * * * I told him we were anxious to reduce our fixed charges. There had been very heavy drafts on the company in various ways, and inasmuch as he was not going to be in Washington, and there was nothing that I knew of pending there that would occasion his services, I thought it would be perhaps as well to discontinue his services. He agreed in that and I gave him the money. (Rec., pp. 120, 121.)

That was a payment of $500 in cash. During the conversation on this occasion, and after he had been

paid the money, Burton said to Mahaney that letters from a man in his position were likely to be misconstrued, and said that if Mahaney had any correspondence from him it would perhaps be as well to destroy it; that his name had been connected in some newspaper articles with the National Securities Company, and it had created a great deal of unfavorable comment, and he did not want a recurrence of anything of that kind. Thereupon Mahaney produced from his desk two letters written by Burton and destroyed them in Burton's presence. One of these letters was confirmatory of Burton's telegram as to the good standing of the "real McGowan" [the Indian agent] with his superiors. The other was the letter referred to in Burton's telegram of February 26, giving "full particulars" as to the two special inspectors reported to have been appointed.

McRae, the controller of the Rialto Company, was also present at this interview and testified that Burton said that before leaving Washington he had called at the Department and there learned that there were no complaints against the Rialto Grain and Securities Company; that Mahaney had said to him (McRae), in Burton's presence that the Senator had tendered his resignation and severed his connection with the company and had been paid up to date; that the Senator felt that he was not earning his fees in view of the fact that there had been nothing doing for some time past and that everything had been "cleaned up" in the Department.

Burton also had destroyed certain letters written by him to Harlan, which were returned to him by Harlan at his request. On the United States attorney's calling for them in connection with the Federal proceedings against Dennis et al., Burton informed Harlan that he had destroyed them.

During the following summer the investigation upon the additional complaints which had come in against the Rialto Company was pursued vigorously and thoroughly, and this, in connection with the States' activity, resulted in thoroughly breaking up the company.

On January 23, 1904, the indictment against Burton was returned, and on the same day he saw Chief Inspector Cochran again, this time also calling Cochran to his committee room. At that interview Burton, Cochran, Smith (Burton's secretary), and Inspector Vickery, of the Post-Office Department, were present. Burton said he wished to talk the matter over with Cochran, who warned him, properly, that he had been a witness before the grand jury, and should be a witness for the prosecution if the case came to trial, and spoke of official proprieties which prevented him from discussing the case with Burton. Nevertheless, Burton said he wished to recite his recollection of what had occurred. He said that whatever he had done had been done as an attorney for the company; that he had no idea he had committed any impropriety in visiting the Department on matters of this kind; he had so visited the Pension Office. He said he had not been

practicing before the Department. Yet it is clear that he emphasized the fact that he had appeared for the Rialto Company as attorney, for Vickery also testifies to that statement. Evidently he desired that his appearance in his senatorial capacity should be minimized. He added that he had always sought not to antagonize and bias the Department, and that he desired rather that his client should come into harmony with its rules. He said that he had been employed in the case as attorney; that he had received a good fee, with other expressions showing that he rated the value of his own services high.

I have not obstructed this story of the case by constant citation of the record pages. The court will read the record carefully and will see that the story is accurate and strictly justified. I submit that the accused knew the law and his duty well enough; knew what the dangers of his client were and the peril in which he himself stood, and deliberately chose and then eagerly proceeded to render the prohibited services. It is difficult to understand how a United States Senator could render such services in such a matter to such people, even if they had been his constituents and even if he had not taken compensation. No doubt from the mere legal point of view he could have done all he did for his "clients" if he had chosen, as a good-natured service *gratis* to friends, without breach of the statute or even of the ordinary code of ethics, but when he sought and accepted the fees he completed the fatal circle.

JURISDICTION.

The first inquiry which the court will undertake for itself, whether or not counsel discuss it, is that of jurisdiction. It is a matter to be submitted to the court rather than urgently contested in argument. It may no doubt be said that it is very desirable that this court should determine as soon as possible the meaning of the statute and the question of the guilt of the accused, but if the case should for such reasons, or any reasons, reach the court, there is an orderly way, a due course, and a regular time for that purpose. I do not hesitate to express my conviction that the case is not properly before the court now.

It can not be doubted that one of the main purposes of the judiciary act of 1891 was to relieve this court of writs of error in ordinary criminal cases (*Lau Ow Bew, petitioner*, 141 U. S., 583; *McLish* v. *Roff*, 141 U. S., 661; *American Construction Co.* v. *Jacksonville Ry.*, 148 U. S., 372). So far as the grade of offense is concerned, this is such a case. Of course defendant's effort to have the case regarded as an infamous offense could only have related to the right of challenge, for the review of an infamous crime no longer comes before this court, because under the amendment of 1897 (29 Stat., 492) to the judiciary act of 1891, the right of review in this court by direct appeal in criminal cases is restricted to capital cases. The withdrawal from review by this court of other infamous crimes further accentuates the original purpose of the act of 1891 to relieve the court of the larger part of its former appellate criminal jurisdiction.

There is here no ground for review included in section 5 of the circuit court of appeals act. It is true that the jurisdiction of the court below is in issue in a certain sense. That point was made collaterally, but that issue was not sharply drawn in the proceedings below. But whatever may be said about the place of payment of the *checks* as affecting the jurisdiction, there can be no doubt about the *cash* having been paid in St. Louis. Further, in cases in which the jurisdiction of the lower court is in issue, that question alone must be *certified* here to bring the case within section 5.

The case in no wise involves the construction or application of the Constitution or the *constitutionality* of a law of the United States; the inquiry solely relates to the proper *interpretation* of the law.

I can not find that the question of the constitutionality of this statute was raised below at all or appears in any form in the record. I suppose, however, that some argument on that point will be addressed to the court by the plaintiff in error. I submit that it is not before the court, and that if it is raised now, it is a pretext or pretense and a mere endeavor to secure a firm lodgment of the case before this court. That can not be done by mere assertion that the question of constitutionality is involved, when manifestly that is not so. How can it be doubted that Congress, within the most conservative ideas of the scope of its power, can pass a law like this for the moral and legal guidance of its own members and of the executive officers and employees of the Government? How can it be doubted that just as an

inquiry by the Postmaster-General to preserve the purity and effectiveness of the postal service is within his legal and constitutional power as well as within his historical authority, so Congress may comprehensively make the test of the rule which it imposes upon members of the legislature and the executive service the fact that there is some particular business going on in a Department ordinarily calling for services to the private person or persons interested, viz, a charge, an accusation, an arrest, a proceeding, any matter or thing, which plainly includes such an inquiry as is now presented.

I am unable, after careful study and consideration, to perceive a shred of reason why this prosecution below or here can be said to present the question of constitutionality.

No ground appearing, then, for looking upon the case as included, even by strained construction, within the categories of section 5, and there being no doubtful or double aspect of the case suggesting reasons for an alternative direct review in this court as well as in the circuit court of appeals (*Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S., 397 and cas. cit.), it seems manifest that the writ of error already taken out of the circuit court of appeals is the proper one, and that the case is specifically final in that court under section 6 of the circuit court of appeals act as a criminal case, unless this court sees fit now or hereafter to grant the writ of certiorari.

Upon that, the ultimate point regarding jurisdiction, I respectfully take leave to say that while it can not be

doubted that the case, for manifest reasons, is a case of importance, ordinarily the court will not issue the writ until the controversy has been finally settled below, and will not interrupt the orderly course of review by bringing the case here at an intermediate stage, although the court reserves the power to issue the writ at any stage if they think fit to do so.

I submit therefore that it is necessary to conclude that the court is without jurisdiction to consider and determine this writ of error, and that the application for certiorari is premature and ought not to be granted now, at all events.

ARGUMENT.

I.

The inquiry pending before the Post-Office Department was a "matter or thing" in which the United States was "interested" within the purview of section 1782.

The Constitution empowers Congress to establish post-offices and post-roads. Under that power Congress has created the Post-Office Department and the office of Postmaster-General, and authorized and directed him, among other things, to instruct all persons in the postal service with reference to their duties, and to superintend generally the business of the Department and execute all laws relative to the postal service. (Sec. 396, Rev. Stat.)

Congress provided (sec. 3929) that the Postmaster-General may, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent

lottery, etc., or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post-office at which registered letters arrive directed to any such person to return all such registered letters to the postmasters at the offices at which they were originally mailed with the word "Fraudulent" plainly written or stamped upon the outside of such letters, etc.

Congress also provided (sec. 5480) that if any person, having devised any scheme or artifice to defraud, or [to] be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the Post-Office establishment, etc., shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States or take or receive any therefrom, such persons so misusing the Post-Office establishment shall be punishable by fine and imprisonment.

It is not necessary to delay the court with argument upon the broad scope of the powers thus created and conferred, upon the competence of Congress, or the authority of the Postmaster-General. It is an essential and fundamental part of the idea of posts and postal service that this administration should be a governmental matter of the highest importance and sanction; that broad and exclusive power should be lodged in the central authorities of Government, and that Gov-

ernment should take care that no shelter or aid shall be permitted to fraudulent schemes from the mail service.

In pursuance of his authority the Postmaster-General has established regulations, and among the rules prescribed are those sections referred to in the record which embody the provisions of the Revised Statutes just cited, and direct how departmental inquiries and investigations respecting the fraudulent use of the mails shall be conducted.

One section of the regulations shows their theory, and is sufficient to quote, viz:

> SEC. 44. Post-office inspectors are the special representatives of the Postmaster-General. * * * Alleged violations of law are to be investigated and reported upon by them, and they will, when necessary, aid in the prosecution of all criminal offenses.

All of these powers, authorities, and rules are well within the strictest views of the extent of the post-office branch of Federal power. Upon the foregoing propositions I cite the following authorities, laying down the established principles of law upon the subject:

In *Public Clearing House* v. *Coyne* (194 U. S., 497), which involved the authority of the Postmaster-General to issue fraud orders, Mr. Justice Brown, delivering the opinion of the court, said (pp. 506–507, 508, 509, 510):

> The constitutional principles underlying the administration of the Post-Office Department were discussed in the opinion of the court in *Ex parte Jackson* (96 U. S., 727), in which we held that the power vested in Congress to estab-

lish post-offices and post-roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded. * * * Congress * * * may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy. * * *

It is contended, however, that the laws in question are unconstitutional in that they authorize the Postmaster-General to seize and return to sender all letters addressed to a particular person, firm, or corporation which he is satisfied is making use of the mail for an illegal purpose. * * *

It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an Executive Department. Many, if not most, of the matters presented to these Departments require for their proper solution the judgment or discretion of the head of the Department. * * * Inasmuch as the action of the postmaster in seizing letters and returning them to the writers is subject to revision by the judicial department of the Government in cases where the Postmaster-General has exceeded his authority under the statute (*School of Magnetic Healing* v. *McAnnulty*, 187 U. S., 94), we think it within the power of Congress to intrust him with the power of seizing and detaining letters upon evidence satisfactory to himself, and that his action will not be reviewed by the court in doubtful cases.

In *Bates & Guild Co.* v. *Payne* (194 U. S., 106), where the question involved was the right of the Postmaster-General to refuse the privilege of transmission through the mails as second-class matter to certain publications, the court said:

> We think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster-General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster-General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong, and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied.

In *In re Rapier* (143 U. S., 110), which involved the constitutionality of the anti-lottery act, the court said (p. 134):

> When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. * * * We can not regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of

newspapers is not prohibited, but the Government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communications is not abridged within the intent and meaning of the constitutional provision, unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls.

Following his well-recognized functions in these matters, the Postmaster-General, acting through the assistants and subordinates who represent him and legally and officially speak his will and exercise his discretion as the head of the Department, ordered an investigation of the Rialto Company's affairs upon the receipt of sundry complaints regarding that company's methods. The argument is made by the plaintiff in error at this point that even if there were a pending inquiry—some matter or thing under investigation—these proceedings were pending not before the Department but before the subordinates in the field—that is, the local inspectors at St. Louis; that therefore there was not an inquiry pending before the Department in which the United States was interested. This is preposterous, and it is only necessary to state the suggestion to show its pretense and fallacy.

I may remark here that after the first complaints were received in the Rialto Company affair there appears to have been a lull. Additional complaints

came in from time to time, but no positive and condemnatory report was made by the local inspectors, and the accused and his clients at St. Louis agreed at the end of March, 1903, that there were no troublesome complaints against the company at Washington, and that the matter had been "cleaned up." Subsequently the investigation went on with the results already stated. No criticism, open or covert, of the post-office officials is intended when I say that here is the very evidence of the effectiveness and value of the accused's services to his clients. Because he was Senator, because he was interested and assiduous in his inquiries and representations at the Department, unfavorable action against his clients by the issue of a fraud order in a very damning case was not taken promptly, as would have been clearly legitimate and justifiable under the facts adduced. Action was substantially postponed and the case apparently regarded as venial during Senator Burton's connection with the company, and because of his services.

Returning from this digression, however—at the point reached the argument is made by opposing counsel that at all events there was no inquiry and no proceeding, controversy, charge, or accusation pending before the Post-Office Department in which the United States was directly or indirectly interested.

Civilization and government are not matters of dollars and cents. The ideas which they embody and the results which they seek are practical, of course, but also highly moral. They represent the

development of man beyond as well as in his material needs, and they satisfy other elements in man's nature than bodily appetite and the mere instinct to acquire. It appears to me absurd to suggest that government is only "interested" in a thing of property or money value. The United States is charged to maintain and guard the financial interests of the people. The United States is therefore interested in countless instances where land, money, and goods are involved. None the less is it interested for itself, the Government as an entity, for all the people, and for different groups and individuals among the people, in all sorts of things, events, transactions, and situations which have nothing to do with money. In the end, I suppose, and remotely, many of these matters would ultimately run to a money interest; the United States could be shown to have benefited, to be better off or the reverse, after abstruse calculation, by reason of one contingency or the opposite, respecting such matters in which it is interested. But even if in no sense immediately or remotely an interest in property should appear, none the less the United States is interested. Even individuals are thus vitally interested in a real and true sense in many matters which do not affect their purses; and the theory and contention which are now advanced with apparent earnestness seem to me very strange, viz, that the United States, *parens patriæ*, charged as the Government with the duty of promoting the welfare of the people in all ways known to modern and civilized governments, is not interested in the purity

and effectiveness of its governmental service, but is only interested in the eye of the law provided it has something of practical value at stake, something which can be immediately weighed and measured in money or property.

The primary meaning of "interested" is "to be concerned in a cause or its consequences." This is not a particularly broad meaning. It is the normal and ordinary meaning, and indicates aptly how the United States is interested here, and, I submit, shows conclusively that the Government contention on the subject is sound.

The point, it seems, has never been ruled or much investigated until lately. It is evident that decisions as to the test of the "interest" of an individual respecting the competency of witnesses or respecting private rights of property throw no real light on this question. But certain cases have arisen in the Federal courts in recent years which deal with the subject, most of them relating to the interest of the United States in the purity of the civil service in the honesty of selections for appointment to that service.

In *United States* v. *Bunting* (82 Fed. Rep., 883, 884) there was an impersonation by one person of another at a civil-service examination. Section 5418 of the Revised Statutes was the law presented for construction. That section punishes the forging, etc., of any public record, etc., for the purpose of defrauding the United States. Judge Butler, after saying that when the case first came before him he was under the im-

pression that it was one of conspiracy to defraud, and as the Government had not been defrauded of money or property, he was in doubt whether the statute applied, but that later he had examined the indictments and the law, and was of opinion that the law literally as well as in spirit covers the case, thus declares:

> The offense charged is a grave one, an attempt to prejudice the rights of the United States in the administration of the civil-service statutes. Had the defendants been successful one of them would have obtained a privilege which would have placed him in a favored class and have entitled him to an advantage over others in the appointment to office. The privilege is a valuable one, and the fraud of the defendants was therefore in prejudice of the Government.

In *United States* v. *Bates* (Sup. Ct., D. C., 18 Rep. Civ. Service Com., 141) it was held that falsely making and forging a voucher to an application for examination for appointment is an offense under section 5418.

The two foregoing cases relate to forgery for the purpose of defrauding the United States, but is it not manifest that the United States is *interested* in such a matter?

In *Palmer* v. *Colladay* (18 App. Cas., D. C., 426) it was held that the defendant, charged with conspiring with another person to procure an entry of her name upon a list of eligibles, and presenting a false writing in support of the attempt, was guilty of an offense under section 5440, which punishes a conspiracy either

"to commit any offense against the United States or to defraud the United States in any manner or for any purpose." The court held:

> It is claimed by appellee that to defraud the United States is to deprive it of money wrongfully or of something of money value, and that a falsehood or trick by which its officers are deceived in the matter of selecting those who are to perform work for it could not be a fraud against the United States. We do not agree to this proposition. * * * If falsehoods are imposed upon the person charged with the duty of ascertaining these qualifications [for entry into the civil service], and made to take the place of facts, then the United States is defrauded, is deprived by deceit of the knowledge justly due to its officers in the proper discharge of its business, and it is thereby liable to obtain a less efficient employee.

The last sentence shows how matters in which the United States is interested, or matters in which the United States is likely to be defrauded, may run to and affect its property interests, although on the surface this does not appear to be the case. Is it not a fraud upon the United States, representing all the people, to use the mails to work an artifice to defraud or to obtain money under false pretenses? And when the chances or likelihood of that being done is presented to the Post-Office Department under the law, is not a matter presented in which the United States is interested within the intent and meaning of the statute?

In *United States* v. *O'Connell et al.*, decided February

12, 1903, in the district court for the eastern district of New York, the foregoing authorities were followed, the case being one of false impersonation in a civil-service examination, and defendants were convicted under sections 5418 and 5440.

In *Tyner* v. *United States*, a very recent case (32 Wash. Law Rep., 258), the court of appeals of the District of Columbia followed its decision in *Palmer* v. *Colladay* (*ante*), and denied the contention that to defraud the United States under section 5440 means simply to deprive them of something of pecuniary value.

I cite these cases because, while the law is not the same, nor the analogy complete at all points, nevertheless the underlying principle is the same. In these civil-service cases the proposition established is that the United States is interested in the observance of the law respecting civil-service examinations, and is injured and prejudiced if the law is disobeyed, and is defrauded in a true and just sense if an artifice or wrong is practiced. The injury may be pecuniary, but it may also be serious and far-reaching and yet not of a specific character susceptible of certain ascertainment and pecuniary compensation. In the present case the proposition is that the United States is interested in the effective administration of the postal service; in its purity and freedom from working any wrong; is interested in keeping it from becoming unconsciously an agent of wrongdoers, and an aider of fraud; that when an inquiry relating to the "fraud order" branch of the postal administration is before

the Department the Government is interested directly or indirectly.

The facts in the Tyner case are so fresh in the public knowledge that I do not need to point out the distinctions on the one hand and the similarities on the other between it and the civil-service cases. The court of appeals said, in the course of its opinion holding that willful or corrupt misconduct on the part of an official of the Department is within the comprehension of a statute which makes punishable a conspiracy to defraud the United States in any manner or for any purpose, that—

> The Post-Office Department is charged with the performance of a great public service in which the people of every State, Territory, and district are vitally interested.

Finally, in the case of *Thomas F. Curley et al.* v. *United States*, decided by the circuit court of appeals for the first circuit, in which this court recently declined to grant an application by the defendants for certiorari, the court of appeals, Aldrich, J., held as follows (130 F. R., 1, 3):

> The principal contention of the defendants here is that the word "defraud" in its ordinary common-law acceptation has reference to property and property rights, and the case largely and perhaps wholly depends upon the sense in which the word "defraud" was used in the statute under consideration. Was it intended to limit the scope of the statute to frauds upon property and property rights of the Government, or was it intended to use the word in a

broader sense and for the protection of intangible rights, privileges, and functions of the Government? * * *

In considering a statute enacted for the protection of the Government * * * which declares it a penal offense to conspire to defraud the Government for any purpose, we need not necessarily, we think, approach the question of the interpretation of the word "defraud" from the same standpoint from which the question would be considered if the word "defraud" were used in a State statute enacted for the protection of ordinary property rights of individuals constituting a State; and this is so for the reason that in the one instance the statute in its ordinary acceptation has reference to property and property rights alone, while in the other it has reference to a broader purpose, that of protecting the Government in its administration under the law as well as protecting the property of the Government, which it holds as an incident to the fundamental purpose for which the Government was instituted (p. 8).

A Government does not exist in a personal sense, or as an entity in any primary sense, for the purpose of acquiring, protecting, and enjoying property. It exists primarily for the protection of the people in their individual rights, and it holds property not primarily for the enjoyment of property accumulations, but as an incident to the purpose for which it exists, that of serving the people and protecting them in their rights. * * *

As a moral offense, defrauding the Government of its right and its facilities for rendering

> a proper service to the people, that being the prime object for which it exists, cuts deeper than defrauding the Government of a wheelbarrow, and it is unquestionably within the power of the Government to protect itself against that kind of a fraud (p. 9).

So that I submit, just as the word "defraud" in the cases above reviewed was held to extend beyond the notion of property rights and to include assaults upon the intangible rights and functions of government, so here for similar reasons and upon the same logic must the conclusion be reached that the United States is interested in the sense of the law, not only in a matter pending before a department which relates to and involves money or property, but also in one which affects the intangible concerns, possessions, and duties of government, such as the vigilance, purity, and effectiveness of its mail service.

The claim is that the United States had no direct interest in the issuance of a fraud order. Before the Post-Office Department would be justified in isuing a fraud order under section 3929, it would have to be found that the crime denounced by section 5480 had been and was being committed. If it found that fact, then two things remained to be done: (1) To put a stop to the violations by issuing the fraud order, and (2) prosecute the offenders under section 5480. Will it be contended that the United States has no direct interest in seeing that its laws are not violated, and in punishing the violators? Yet this is the opposing contention.

II.

The services rendered and compensation therefor received by accused were such as are forbidden by section 1782.

As to the substantive offense, that the accused did the forbidden thing is not to be doubted. The record is significant by what unwilling witnesses have forgotten or are loath to say quite as much as by the affirmative testimony for the prosecution. Mr. Burton was certainly counsel or "general counsel" or "associate counsel." Even Mr. Harlan, with all his caution and reserve, felt at liberty to call upon him for "information" (rather than "services"), and "because he was associate counsel, and as such interested" in this or that feature of the business on trial before the Department. He "wanted his assistance," although he left it to Burton to determine what, as Senator, Burton would or would not do. As an instance of such involuntary revelations, Harlan was asked by counsel for the defense:

> Q. What I want to get at is this: Whether in this employment proposed to Senator Burton was anything included as to services to be rendered in any Department of the United States Government.
>
> A. There was nothing said about that *specifically.*

[That is a characteristic way in any such case of denying something of the truth of which the witness is so conscious that he can not wholly deny. Nothing was said *specifically*, but plainly *something* was said.]

Q. On the other hand, wasn't that excluded rather than included? It was not included at all, was it?

A. I have given you his statement in regard to his position as United States Senator, and as far as exclusive language goes I do not remember. I don't want to say one way or the other, but I remember that very distinctly. (Rec., p. 174.)

It is clear enough from the testimony and the letters in evidence—from what was done as well as what was said—that however Burton and his companions might have guarded and hedged even as between themselves the conversation on the train, the accused understood the whole situation and accepted employment which was to include and did include services before the Department. It is equally clear that he accepted compensation, and no amount of precaution at the time or argument now can conceal the fact that he was tempted and fell; that he thought he could do the illegal thing and yet keep his clients and himself within the law. His formal words of protest are like some other famous examples, and only serve to emphasize his knowledge of the prohibition and to bring into sharp relief the inconsistency between his words and his acts.

The trial judge scrupulously refrained from importing any considerations of propriety, and stated with careful precision the legal right of a member of Congress to do all that Burton did up to the payment and receipt of compensation. On these points Judge Adams struck the keynote when he said that the gist

of the complaint is rendering services for compensation—

> The reason of this prohibition [of the statute] is to promote integrity and efficiency, in the discharge of official duties, and to maintain proper discipline in the public service. To permit a Senator of the United States, whose influence by reason of the high position he holds is naturally persuasive and weighty with executive officers, to take compensation from persons for services rendered such persons before an executive department, would, it was thought, create a duty in favor of such persons arising from the implied obligation of fidelity to the client from whom he should accept a fee, inconsistent with those relations of "ready confidence and entire unreserve" which ought to exist between the legislative and executive departments of the Government in the promotion of the public weal and in the enforcement of the laws of the land. * * * Notwithstanding the fact that the accused was a Senator of the United States, he had the legal right, so far as this case is concerned, to practice his profession in any and all of its phases and to receive compensation therefor * * * except that he could not receive compensation for services rendered before the Post-Office Department in any matter pending there in which the United States was interested, as already explained. And in fact the law does not prohibit him from merely rendering services in such matters before the Department. The only prohibition in this respect is against receiving compensation for such services, and

> thereby putting himself into such relations with and under such obligations to the person from whom such compensation is received as are usually created by that act. * * * The gist of the offense denounced by section 1782 is the receiving compensation for services therein referred to. As already stated, the law does not prohibit the mere rendering of services by a Senator before the Department, but the intent and meaning of the law obviously is that if a Senator goes before the Department to render services there to anyone in a matter pending there in which the United States is interested he shall be under no obligation inconsistent with his rendering absolutely disinterested services in such matter. (Rec., pp. 2 0–240.)

And again, when the jury returned for specific instructions, the court said, referring to the portions of the charge which I have just set forth:

> Of course it is not meant that if Senator Burton was employed by the Rialto Grain and Securities Company as general counsel, that that fact permitted him to render services before the Department for which he was to receive and did receive compensation. The gist of the offense charged in the case is rendering services there for compensation; that is the gist of it, rendering services for compensation. So that in answer to the first suggestion I will say it is undoubtedly an incorrect understanding of the law as well as the plain meaning of the statements of the charge to say that merely because the accused was employed

as general counsel, he had the right to render such services before the Post-Office Department. He had the right to go before the Post-Office Department, as I said in substance in the charge several times, in such a way and manner as is consistent with the principles of the law. He could go there and answer questions and make suggestions with regard to any matter that was pending there, provided he did it in a free and independent way, unaffected by the fact of receiving compensation. It would not seem that it is necessary to make further comments with respect to that matter at all. The relations which arise between a lawyer and client when he is employed and is to receive compensation are such as require the attorney at all times and under all circumstances to be faithful to the client and do not permit him to render services against the client in any way or manner. It is for that reason, as I have stated in the charge, that the law prohibits a Senator from entering into relations by which he should receive compensation for those services. He should go before the Department, if at all, as a representative of the people, so that the relation between him and the office should be that of entire unreserve and fairness, unaffected by the fact that he is receiving compensation for the services; so that he should be free; so that he should give information to the Department, which would subserve the interests of the Government and the interests of all concerned, and not be bound by obligations which necessarily inhere from the fact that he is a paid attorney to receive compensation for doing it.

> In other words, as I said before, the gist of the complaint is rendering services for compensation, and therefore the bare fact that he should be employed and had the right to go before the Department to render services does not excuse him, provided he receives compensation for those services (rec., pp. 248–249).

I have quoted here freely from the judge's charge, because it seems to me to bring out his entire fairness to the accused and shows conclusively the soundness of the construction of the law for which we contend. The gist of the offense is the receipt of compensation, and compensation was received.

III.

The district court had jurisdiction of the offense.

On March 26, 1903, the last payment was made at St. Louis to Senator Burton in person and in cash. A check was drawn in the office of the Rialto Company and cashed at their bank, and the bills, five, of $100 each, handed to Burton. If one count of the indictment is good, that will sustain the judgment. (*Rice* v. *Ames*, 180 U. S., 371.)

But the other counts of the indictment are good. The Government proved a custom prevailing in the Washington banks and, indeed, known to all people who have any dealings with banks as prevailing all over the country, by which a bank—taking checks "for collection" just as much in fact as if it were a particular transaction or item technically entered, stamped and indorsed as "for collection" without "returns"

until collected—extends to customers having current accounts, whom they trust and who stand well on their books, immediate credit; the understanding, however, being that the check goes forward for collection for account of and at the risk of the customer, and if not duly paid will be instantly charged back to his account on its return dishonored.

The checks here were drawn to Burton's order as payee by the Rialto Company, upon the Commonwealth Trust Company of St. Louis, and were payable and paid there. They were deposited by Burton to the credit of his current-deposit account with the Riggs Bank, were credited and sent forward for collection in accordance with the rule and custom just stated. It is impossible to sustain the view that these checks, the ordinary cash and demand items of banking transactions, were not actually and legally paid to Burton, the payee upon their face, at St. Louis and by the banking institution located there upon which they were drawn.

Mr. Brice, the cashier of the Riggs Bank, stated the custom on the subject as follows (rec., pp. 106–107):

> The usual custom of the bank, as I stated, is to deposit the check to the credit of the depositor, send it forward direct, either to the place where it is drawn, *for collection*, or else to some convenient collection agency near the place where the check is drawn. If the check is not paid it is returned to the bank in the usual course, going to the bank where it is first sent, and then it takes one of two courses. That check is held in the bank teller's possession until

the depositor calls and takes it up, or else charged against his account as if it were a check drawn against his account and is surrendered to him on settlement of his account, together with other checks or vouchers which he may have drawn, the depositor being duly notified of such nonpayment.

On this point the court charged the jury as follows (rec., pp. 237–238):

It becomes your duty to ascertain and find from the evidence what were the true relations between the accused and the Washington bank when he deposited the check in question with that bank, and what was the understanding between them as to their respective rights in relation to the check and the proceeds thereof. On this question the court charges you as follows:

If it was the intent and understanding of the Washington bank and the accused at the time the latter deposited the check in question with the former that the bank should forward the same in the usual course by and through its correspondents to St. Louis, for payment, and that in so doing it, and its correspondents should act only as the agent of the accused for that purpose, then the final payment by the Commonwealth Trust Company at St. Louis of the check to the correspondents of the Washington bank would amount in law to a payment in St. Louis as charged in the sixth count of the amount of the check to the accused. If, on the contrary, it was the understanding and intent of the Washington bank and the accused at the

time the latter deposited the check in question with the former that the bank should become the purchaser of the check, and should thereafter be the absolute owner thereof, and not act as just indicated, as the agent of the accused in the collection of the check, then the payment at St. Louis by the Commonwealth Trust Company would amount in law to a payment to the Washington bank and not to the accused. In the latter event no crime would have been committed by the accused in this district by reason of the check referred to in the sixth count of the indictment.

In order to find the accused guilty on the sixth count, you must find from the evidence, by the same measure of proof as is required in all criminal cases, that the check referred to in the sixth count was deposited by the accused in the Washington bank for collection, and that the bank was to act in collecting the same as the agent of the accused, and not as the owner of the check in question.

In determining this issue, you are at liberty to and should consider all the evidence adduced; the actual transaction as it occurred at the Riggs Bank, where the check was deposited, the check itself, and all its indorsements, the rights and privileges which were immediately accorded the accused upon making the deposit, the actual conduct and purpose of the Riggs Bank in forwarding the ckeck to St. Louis for payment, the customary conduct and usage of that bank and all banks in Washington at the time so far as shown by the proof. And if from all these facts and all other facts disclosed by the proof,

you find that the check in question was in fact deposited by the accused, with the intent and knowledge on his part, as well as on the part of the bank itself, that it should be forwarded to St. Louis for collection for account of the accused to make such collection, you should find that when the same was actually paid to the last indorser on the check at St. Louis, by the trust company upon which it was drawn, it was, in contemplation of law, paid to the accused himself.

If on the contrary you find from the evidence that the accused and the Riggs Bank at the time of the deposit of the check in question, understood and intended that the bank should become the purchaser of the check and be its absolute owner, then the subsequent forwarding of it to St. Louis for payment was the act of the bank itself, and the final payment of the check by the trust company at St. Louis was a payment not to the accused, but to the bank, and if such is the fact your verdict on the sixth count must be not guilty.

The seventh, eighth, and ninth counts of the indictment are similar in all respects to the sixth count, with the exception that in the seventh count the accused is charged with having received a check and the proceeds thereof, dated December 15, 1902.

And in the eighth count with having received a check and the proceeds thereof, dated January 22, 1903.

And in the ninth count with having received a check and the proceeds thereof, dated February 16, 1903.

No fault can be found with this charge and with the views of the law upon the subject indicated by the court's statement of the alternative theories upon which the jury should proceed. (*Ward* v. *Smith*, 7 Wall., 447; *Dodge* v. *Savings and Trust Co.*, 93 U. S., 379; *Evansville Bank* v. *German American Bank*, 155 U. S., 556, and cas. cit; *Scott* v. *Ocean Bank*, 23 N. Y., 289.)

It is preposterous to contend that this payment of checks was solely and entirely made in Washington. And it is to be remembered that even if it should be contended that the payment at St. Louis was not a sole and independent transaction, that the process of payment was at least begun in St. Louis and completed in Washington, or begun in Washington and completed in St. Louis, then section 731 of the Revised Statutes applies. That section provides as follows:

> When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired or tried, determined and punished, in either district in the same manner as if it had been actually and wholly committed therein.

Plaintiff asserts, as one of the grounds upon which the jurisdiction of this court is claimed to be based, that the constitutionality of section 731 is involved here. But the constitutionality of that statute is not open to discussion. It has been before this court for consideration and its constitutionality upheld in several cases.

In *In re Palliser* (136 U. S., 257), where the offense consisted in sending a letter, containing a bribe, from New York to a postmaster in Connecticut, the court held that the offense was begun in New York and completed in Connecticut, and that under section 731, petitioner could be tried in Connecticut. As in the present case, it was contended that section 731 was void in view of the provisions of Article III, section 2, of the Constitution, which provides that in all criminal prosecutions accused shall have the right to be tried by an impartial jury of the State and district wherein the crime shall have been committed; but that that statute did not cover the case, as the alleged crime was complete when the letter was mailed in New York. The court pointed out that the right secured by Article III, section 2, of the Constitution is not a right to be tried in the district where the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district "wherein the crime shall have been committed," and that therefore in the case of a crime begun in one district and completed in another, which may under section 731 be held to be committed in either district, the accused, in being tried in either district is still within his constitutional right.

> When a crime is committed partly in one district and partly in another, it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the legislature may designate; and Congress has accordingly provided that "when any offense against

> the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either. * * *
>
> In the case before us * * * it might admit of doubt whether any offense against the laws of the United States was committed until the offer or tender was known to the postmaster and might have influenced his mind. But there can be no doubt at all that, if any offense was committed in New York the offense continued to be committed when the letter reached the postmaster in Connecticut; and that if no offense was committed in New York an offense was committed in Connecticut; and that in either aspect the district court of the United States for the district of Connecticut had jurisdiction of the charge against the petitioner (pp. 266–267).

To the same effect was *Horner* v. *United States* (143 U. S., 207), which involved the offense of mailing a lottery circular at New York to a person in Illinois.

In *Putnam* v. *United States* (162 U. S., 687) the president of the Bank of Exeter, N. H., was indicted in that State for defrauding the bank. Accused, while in Boston, Mass., drew checks on a Boston bank having funds of the Exeter bank on deposit, and obtained and used the money in Boston. He was tried in New Hampshire on the theory that the abstraction was had in that State, as the drawing out of the money from the Boston bank exhausted the credit of the Exeter bank. The court said it was clear that although the commission of the offense charged may have been

begun in Massachusetts, if it was completed in New Hampshire the court had jurisdiction under section 731, Revised Statutes, adding (p. 711):

> On the face of the foregoing facts it is evident that the alleged criminal acts arising from the two January checks were begun in Massachusetts. The question is, Were such acts there completed, or did the final fact, which was essential to effectually absorb the credit of the Exeter bank with the Boston bank, take place in New Hampshire? The relation between the banks was that of debtor and creditor. The checks having been drawn, collected, and debited in Boston, constituted a concluded transaction, if there was authority to draw them. * * * If * * * the checks were unauthorized and the illegal debit which was made as the result of their payment was ratified and made binding in New Hampshire by the Exeter bank, it is clear that the act which consummated the taking of the credit of the Exeter bank was completed in New Hampshire, and was therefore within the jurisdiction of the court.

IV.

It was competent for the accused to waive his constitutional privilege of freedom from arrest, and he was not arrested.

The Articles of Confederation provided (Art. V):

> Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their

> persons from arrests and imprisonments during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

This language shows the fundamental purpose in all such provisions which appear in the free government charters of English-speaking people.

The first form of the privilege is found in the Bill of Rights of 1689, from which so many of our constitutional guaranties were drawn even down to forms of expression, viz:

> That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament. (Stubbs, Select Charters of Constitutional History, second edition; Oxford, Clarendon Press, pp. 523–525.)

This, the original form so far as I can discover, shows the theory and the reason which I have just pointed out.

The purpose of this particular form of legislative privilege has been to protect members of the law-making assemblies from royal oppression and executive tyranny, often exerted until recent centuries by summary and disciplinary processes, sometimes through executive officers, sometimes through the courts, against recalcitrant and daring members of the legislature. Slight reflection on the parliamentary history of England between 1625 and 1660, for instance, will confirm this statement. The particular right of legislators which was thus to be preserved was the right of

free speech, and in considering the meaning and extent of the privilege that ground and reason for it must not be forgotten. The provision in the Constitution merely omits the statement of the reason as a general and preliminary principle, and gives it as an alternative or additional branch of the privilege. It is (Art. I, sec. 6, cl. 1):

> The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during the attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

In *Coxe* v. *McClenachan* (3 Dall., 478) there was a judgment against defendant, a member of Congress, which was in session at the time, returned *non est*, and then a *sci. fa.* against special bail when the defendant was surrendered to the sheriff; and then a motion was made for leave to enter an *exoneretur*. The case was compromised by an agreement that the bail should remain responsible to surrender within four days after the end of the session—that is, the defendant was in effect arrested, having been placed in the custody of the sheriff by his bail, and besides, he contended *ab initio* for his privilege instead of waiving it.

But the privilege includes other grounds than freedom of speech and is ancient, and the subject must be more carefully examined.

The privilege under our Constitution is not to be confounded with the ancient "privileges of Parliament," which are numerous, vague, and indefinite, and run to the idea of prerogative and the immunities of noble rank. These privileges, not originally including freedom of speech, were of person, of domestics, and of lands and goods. Parliament was the only judge, not so much of what they were as when they were offended. They were traced to the laws of Edward the Confessor and the old Gothic constitutions. (1 Bl. Com., Lewis's ed., pp. 164, 165; Bowyer's Com. on Constl. Law of England, 2d ed., pp. 82–84; Hallam's Const. Hist., Vol. III, pp. 379, *et seq.;* Salk., 505; *Stockdale* v. *Hansard*, 9 Ad. and El., 225.) Blackstone says (*ut sup.*): "Neither can any member of either house be *arrested and taken into custody, unless for some indictable offense*, without a breach of the privilege of Parliament." And see Bouvier, Rawles' Rev'n, vol. 2, p. 755, where the privilege is restricted to arrest on *civil process*—temporary, as in the case of legislators, *eundo, manendo, et redeundo;* and it is said that it does not extend to defendants in *criminal* cases. This is again the intimation in Bowyer, *ut sup.* (p. 84), where it is said that the members of Parliament are exempt from arrest *in civil suits*, and that the privilege does not extend to treason, felony, and breach of the peace, nor to contempts of court which are *in the nature of criminal offenses.* It seems evident that one of the foundations of the right was the principle that the realm was entitled to the legislator's services uninterrupted by

the constant *arrests for debt* and detention in "sponging houses" which were prevalent during former times. As I have said, the modern extension of the privilege, which has been specifically shown to be the only basis for it in this country, viz, to protect freedom of speech, appeared in England first in the Bill of Rights of 1689 (1 Wm. & M., s. 2, c. 2) and soon thereafter the general privileges were restricted to prevent "any inconveniences that may happen by privilege of Parliament," by the 12 and 13 Wm. III, c. 3, which provided that while an action of debt might proceed and should not be stayed under color or pretense of privilege, no peer of the realm or lord of Parliament should be *arrested* or *imprisoned* during the continuance of the privilege, that is, during a session (See also 11 Geo. II, c. 24; 10 Geo. III, c. 50.) In 1 James I, c. 13, it was provided that after a session new writs of execution may issue and the person from whose custody a privileged person was delivered should not be charged.

In Viner's Abridgment (2d ed., vol. 11, p. 36), in commenting on 1 Jac., 1 cap. 13 (*ut supra*), a marginal note indicates a public interest in the question. It was resolved (one in execution having had a writ of privilege and the sheriff setting him at liberty; *quære*, Shall he be taken in execution again after the Parliament is ended?):

> *First*, That the privilege was grantable, notwithstanding the execution, because the King and the Realm have an interest in the body of every burgess of Parliament, and the common weal shall be preferred before the interest of

any private person. *Secondly*, That after the Parliament ended he might be taken in execution again; for that the plaintiff shall not be prejudiced in his execution by the act of the law which doth wrong to no man. (Heath's Maxims, 279; citing S. C.)

Here, again, the legislator was actually *arrested and claimed his privilege*, and in the present case there is no conflict between the *public* interest and the claim of a *private creditor* and suitor.

As to the personal nature of the right, in *Bartlett* v. *Hebbes*, 5 Term Rep., 686, East, the learned advocate and reporter said in argument, in speaking of the privilege of an officer of the King's household against an arrest for debt: "This is not like the case of an infringement of the franchise of a private lord, in which the courts have held the arrest good as against the party, though the lord might maintain an action for the breach of his privilege, *he alone* being injured by the arrest."

I think, therefore, on the whole, it is sound to conclude that here in America the ancient and prerogative character has disappeared from the personal privileges of legislators; that the main purpose of the privilege here is to protect freedom of speech; that it is only an exemption from *arrest* and in civil suits; that it does not grant immunity, even temporarily, from a criminal prosecution; that it does not operate to delay the proceedings on a trial; that it is personal and must be seasonably claimed, and may be waived without violating principle or injuring public interests.

In *Geyer's Lessee* v. *Irwin* (4 Dall., 107) the supreme court of Pennsylvania said:

> A member of the general assembly is, undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him. And, we think, that upon principle, his suits can not be forced to a trial and decision, while the session of the legislature continues.
>
> But every privileged person must, at a proper time, and in a proper manner, claim the benefit of his privilege. The judges are not bound, judicially, to notice a right of privilege, nor to grant it without a claim. In the present instance, neither the defendant, nor his attorney, suggested the privilege, as an objection to the trial of the cause: and this amounts to a waiver, by which the party is forever concluded.

The distinguished judges composing that court appear to have entertained no doubt that it is competent to waive the privilege and that there may be a waiver by acts and acquiescence. Here the privilege was indignantly repudiated by the defendant's words and prompt action in appearing and urging immediate trial.

Bouvier (as cited *ante*) points out how the privilege may be enforced if violated by *arrest*, viz, by the legislature itself, referring to Cooley and other authorities, and he quotes from Brett as follows: "When attachment is mere process, privilege exists; when it is *punitive* or *disciplinary*, privilege does not exist."

But I submit that the point of law as to exceptions

from the privilege has been *conclusively* determined. Thus Blackstone says (vol. 1, p. 166):

> The only way by which courts of justice could anciently take cognizance of privilege of Parliament was by writ of privilege, in the nature of a supersedeas, to deliver the party out of custody when arrested *in a civil suit.* For, when a letter was written by the speaker to the judges, to stay proceedings against a privileged person, they rejected it as contrary to their oath of office. But since the statute 12 W., III, c. 3, which enacts that no privileged person shall be subject to arrest or imprisonment, it hath been held that such arrest is irregular *ab initio*, and that the party may be discharged upon motion. It is to be observed, that there is no precedent of any such writ of privilege, *but only in civil suits;* and that the statute of 1 Jac., I., c. 13, and that of King William (which remedy some conveniences arising from privilege of Parliament), *speak only of civil actions.* And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes; or, as it has been frequently expressed, of treason, felony, and breach (or surety) of the peace. Whereby it seems to have been understood that no privilege was allowable to the members, their families or servants, in any crime whatsoever, for all crimes are treated by the law as being *contra pacem domini regis.* And instances have not been wanting wherein privileged persons have been convicted of misdemeanors, and committed or prosecuted to outlawry even in the middle of

a session; which proceeding has afterwards received the sanction and approbation of Parliament. To which may be added, that a few years ago the case of writing and publishing seditious libels was resolved by both houses not to be entitled to privilege; and that the reasons upon which that case proceeded extended equally to every indictable offense.

Blackstone cites authorities for this view.

And Judge Story, in his work on the Constitution, says, section 865:

The exception to the privilege is, that it shall not extend to "treason, felony, or breach of the peace." These words are the same as those in which the exception to the privilege of Parliament is usually expressed at the common law, and were doubtless borrowed from that source. Now, as all crimes are offenses against the peace, the phrase "breach of the peace" would seem to extend to all indictable offenses, as well those which are in fact attended with force and violence as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order. And so, in truth, it was decided in Parliament, in the case of a seditious libel published by a member (Mr. Wilkes), against the opinion of Lord Camben and the other judges of the court of common pleas, and, as it will probable now be thought, since the party spirit of those times has subsided, with entire good sense and in furtherance of public justice. It would be monstrous that any member should protect himself from arrest or punishment for a libel, often a crime of the

deepest malignity and mischief, while he would be liable to arrest for the pettiest assault or the most insignificant breach of the peace. [See notes citing authorities.]

What happened in this case; what did Senator Burton do? He waived his privilege promptly, fully, and indignantly. He went to St. Louis as fast as steam could carry him. "He said he was going to St. Louis as soon as he could and insist upon a trial." "Senator Burton says he will go at once to St. Louis and defend the case, and has no doubt that he will be able to make it perfectly clear that there was no reason for bringing the indictment." "Senator Burton declared his intention of going to St. Louis and expects to leave here some time to-morrow afternoon." "I have not violated any law, nor is it my intention to seek vindication by any technicality." (Testimony of Lindsay and Aubere, verifying interview with Burton, and "dictated statement" in Kansas City Star and St. Louis Globe-Democrat, respectively, of January 23, 1903; rec., pp. 151–162.) Burton himself testified as follows on direct examination:

Q. When were you advised of the fact of your indictment?

A. On the afternoon of the 23d of January last. * * *

Q. Now, how soon after that did you leave Washington for St. Louis, with reference to your appearance here?

A. I left in about twenty-four hours.

Q. Did you come to St. Louis as speedily as possible?

A. Yes, sir; there was but one train I could have come on sooner.

Q. And when did you get here?

A. We were delayed about twenty-two or twenty-three hours, and I think arrived on Tuesday afternoon, leaving there on Sunday.

Q. Detained by what?

A. Detained by a snowstorm.

Q. And how soon after your arrival here did you enter your appearance in court here?

A. The next morning. (Rec., pp. 223, 224.)

Mr. Burton thus waived his privilege by his action and by his prompt and eager appearance to answer the charge and go to trial. The privilege objection was never hinted at during the trial, and was first raised by his counsel on the motion in arrest of judgment which the court overruled without opinion. They say it "is not merely a personal privilege, but is a prohibition against arrest *or judicial proceedings*." The prohibition is not against *judicial proceedings*, but only against *arrest*. It does not mean that a member of Congress shall not be tried for an offense which he commits, but only that he shall not be taken into custody or forced to trial against his will during a particular period. And it does not extend to prosecutions for crime; that we have shown above. The privilege is merely personal, and is traceable to the principle of free speech and freedom from compulsion to answer elsewhere for legislative utterances. It is not at all like the constitutional duty and right of jury trial (with its concomitants), which is a universal mandate

to guard a system of jurisprudence and protect all the people, and therefore can only be waived, modified, or dispensed with under certain special circumstances and in certain peculiar situations because of the *public* interest in the principle.

> We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. * * * The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty can not be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. (4 Bl. Com., 11.) Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial—that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution. (*Hopt* v. *Utah*, 110 U. S., 574, 579.)

It is evident that the present case does not fall within that principle. The privilege is purely personal, for a special reason of limited application, and no logical argument can be advanced why it may not be waived. The point rather falls within the ground of decision in the recent oleomargarine cases (*Schick* v. *United States; Broadwell* v. *United States*, 195 U. S., 65), viz: "When there is no constitutional or statutory mandate and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy."

It is well for opposing counsel to remember, in their effort to raise the grade of offense here, that the line between clearly marked felonies and infamous crimes, or crimes bearing an infamous punishment, is delicate and difficult to draw; that, presumptively, if an offense is not a misdemeanor it is a felony, and that while that doubt here, if well founded (which I deny, as heretofore shown), would have given the defendant ten challenges instead of three, equally would it operate to dispose of the privilege now claimed, for that does not extend to felony by the very language of the Constitution. And, besides, "breach of the peace" includes all indictable offences.

On April 6, 1904, when Congress was in session, the accused was sentenced (Rec., pp. 25, 26). The sentence directed the marshal to deliver the prisoner to his jailer, but did not express the date from which sentence was to run or direct the marshal to proceed forthwith. It must be assumed that the court intended the sentence to take effect when legally this could

happen—that is, after the session of Congress had ended. And, besides, "thereupon"—that is, as soon as sentence was pronounced—the defendant's bill of exceptions was tendered to the court and duly allowed and sealed as part of the record; the defendant was immediately admitted to bail and a supersedeas was awarded and judgment and sentence stayed. Furthermore, if a sentence is erroneous, that does not invalidate the trial and judgment. This court either corrects (*United States* v. *Pridgeon*, 153 U. S., 48) or remands the case for correction by the trial court. (*In re Bonner*, 151 U. S., 242; *Ballew* v. *United States*, 160 U. S., 187, 202.)

It is unnecessary to asseverate that the Government keenly realizes the gravity and meaning of this case and the heavy responsibility which rests upon the prosecuting officers. That feature has been matter of scrupulous deliberation and solemn reflection all through these proceedings—before the indictment was drawn, in the presence of the grand jury, in the trial court, and here. The Government has been aware of its duty as prosecutor toward the defendant, but the earnest prosecution of crimes and misdemeanors is one of the foundations on which society rests—a chief instrument and force in holding society together. This case peculiarly illustrates the need in these times of imposing and maintaining high standards of civic conduct, especially in that delicate and sensitive medium where the legislature and the executive meet. If the atmosphere there is not pure, it does not require recent

examples to point out the deadly menaces to our healthy national life. Judge Adams finely states to the jury the proper guides and rules for the conduct of members of Congress in this domain, which, it is sad to say, Senator Burton wholly ignored and violated.

I respectfully submit that the writ of error should be dismissed for the lack of jurisdiction; or, if the court hold otherwise on that point, I submit that there was no error in the trial and that the judgment and sentence below must be affirmed.

HENRY M. HOYT,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOSEPH RALPH BURTON, PLAINTIFF in error,
v.
THE UNITED STATES.
No. 343.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

SUPPLEMENTAL AND REPLY BRIEF FOR THE UNITED STATES.

The nature and importance of the case seem to justify fuller treatment in this supplemental and reply brief than would ordinarily be necessary or appropriate.

I.

As to the nature of the offense, whether felony or misdemeanor, and the right of challenge.

In approaching the question of the nature of this offense, two or three points should be borne in mind. In the first place, that there have always been in the law two ideas on the subject, one regarding the essential character of the act as very grave or less so, as

shameful *per se* or otherwise, and the other considering the punishment imposed, not so much as the *only* test, but as a significant test.

In England there has always been a leaning, it seems, to the test of the essential nature. The graver crimes, like murder, burglary, arson, were felonies *per se*, and not simply because the punishment imposed marked them as such, involving forfeiture of property, life or limb, and civil disqualifications. So true is this that by the modern statute of 24 and 25 Victoria, chapter 96, section 46 (1861), the only crime denounced and defined as infamous is one the shameful nature of which is revealed when it is named. That is, some crimes are infamous *per se;* some carry an ignominious or infamous punishment.

Second, it should also be borne in mind that the offense of section 1782 is one of those lying (legally) among the lighter phases of *crimina falsi*, embracing frauds and breaches of trust, private or public, which not so very long ago were not regarded as crimes at all, or even misdemeanors, which were elusive and hard to seize, which involved simply civil liabilities and damages and which only in recent years have been carried over from mere breach of trust or impropriety into the class of offenses and misdemeanors. From the old point of view they were minor offenses, and it is only the modern conscience, especially in relation to civic and public duties, which regards them as grave. It can not be doubted that such offenses *are* most serious, but I emphasize the point that in the predilections of the criminal law they are matters of

evil *demeanor* rather than sinful crimes. This statute is the culmination of that modern evolution applied to our public life.

Again, every man is equal in the eye of the law. Almost any offense which is the subject of information and indictment might properly enough bear the consequences of the usual civil disqualifications. Many do, which are cognate with the present one (R. S., secs. 1781, 1788, 1789, 3890, 5334, 5408, 5449, 5499, 5500, 5501, 5502). Some of these are denominated misdemeanors in the respective statutes. All of them are mere misdemeanors. The law, charging a man with an offense and convicting him, marks the community's reprobation, which is the necessary and deterrent consequence of misdeeds, by putting the stigma upon the convict that he is not fit to take part in the community's affairs and enjoy these particular privileges and immunities. But certainly we must regard this "infamy" without respect of persons. Because a man occupies a high position and the sting of the infamy may therefore be more bitter to him is no reason for saying that that part of the punishment should increase the grade of the offense and enlarge his protection and rights, any more than if the case put the same stigma upon a poor wretch who never held office and could never expect to.

If a man does the wrong act, the public disgrace is a punishment especially fitting this offense. If a public servant commits this peculiarly public offense, being against the entire community, it is precisely appropriate that he should be disqualified for the public service. He has this stigma in view all through as a penalty if he

offends, and the bar should not be regarded in an isolated way and *per se* to magnify the offense in its technical bearings. The nature and grade of the offense should be determined by its essential elements, and the dishonor be regarded merely as a natural consequence of the commission of that particular misdemeanor.

I am aware that in respect to the right of presentment by grand jury under the fifth amendment to the Constitution the court has said (e. g., *Ex parte Wilson*, 114 U. S., 417, 428) that for more than a century imprisonment at hard labor in a penitentiary has been considered an infamous punishment in England and America, and unless that ignominious penalty with its accompaniments is infamous there is now no infamous punishment other than capital. But I submit that these views and other similar views expressed by the court ought not to rule the present question, which relates not to the constitutional guarantee of indictment by grand jury, but to the statutory right of challenge. And, besides, are felonies and crimes bearing an infamous punishment coterminous at all points?

I submit that this is not a felony; that it is a misdemeanor in name and nature, a misdemeanor pure and simple, as Judge Adams calls it, and that the defendant was therefore only entitled to three challenges and not to ten, as having committed a felony, under section 819. That section provides:

> When the offense charged is treason or a capital offense the defendants shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to *three* peremptory challenges; * * *

But section 1782, which creates the offense and prescribes the punishment, also specifically classifies the offense as a *misdemeanor*. Being so denominated by Congress, the mere fact that infamous punishment is attached does not raise the offense to the grade of felony. The Constitution does not fix the number of challenges to which a person shall be entitled when placed upon trial for any felony or infamous offense. If the offense be capital or infamous, a person shall not be held to answer, except upon the present ment or indictment of a grand jury (Art. V), and he shall enjoy the right to a speedy trial by an impartial jury (Art. VI); but the Constitution does not direct how the jury shall be impaneled or as to the number of challenges a person shall enjoy when put upon trial. The jury shall be *impartial*, and he may challenge any number for cause. But the right of arbitrary challenge, without cause, is regulated entirely by statute.

In the crimes act of April 30, 1790 (1 Stat., 112), by section 30 a person accused of treason was permitted to challenge peremptorily 35 jurors, while a person on

trial for a capital offense might challenge but 20. No provision was made for such challenges in other cases.

In the act of July 20, 1840 (5 Stat., 394) Congress authorized the courts of the United States "to make all necessary rules and regulations for conforming the designation and empaneling of juries, in substance, to the laws and usages now in force" in the respective States. That statute came before this court for construction in the case of *United States* v. *Shackleford* (18 How., 588). There the defendant was charged with a misdemeanor and the question arose, in empaneling the jury, whether the prisoner was entitled to any peremptory challenges. Speaking with respect to the power conferred, the court, Mr. Justice Nelson delivering the opinion, says (p. 590):

> The court is of the opinion that the power conferred upon the Federal courts to adopt "rules and regulations for conforming the designation and impaneling of juries to the laws and usages in force at the time in the State" enables them to adopt the laws and usages of the State in respect to the challenges of jurors, whether peremptory or for cause, and in cases both civil and criminal, with the exception, in criminal cases, of treason and other crimes, of which the punishment is declared to be death.

This exception thus made in capital cases was put upon the ground that the right of peremptory challenge had been expressly conferred by the act of 1790.

Under that law if a State should not permit peremptory challenges in felonies not capital, then no such

right would exist upon a trial for such a felony in the Federal courts. That is, the express Federal rule and right is purely statutory.

By the act of March 3, 1865 (sec. 2, 13 Stat., 500), Congress reduced the number of challenges to which a person should be entitled upon trial for a capital offense; and by the act of June 8, 1872 (17 Stat., 282), Congress amended the act of 1865 by providing the rule preserved in section 819.

In *Bannon and Mulkey* v. *United States* (156 U. S., 464) the defendants had been convicted of an offense named in the statute as a misdemeanor (sec. 5440), the punishment for which was a fine not exceeding $10,000, or imprisonment not exceeding two years, or both fine and imprisonment. Mr. Justice Brown delivered the opinion. After speaking of offenses being made *felonies by statute* (p. 466), he says, page 467:

> Neither does it necessarily follow that because the punishment affixed to an offense is infamous the offense itself is thereby raised to the grade of a felony. The word "felony" was used at common law to denote offenses which occasioned a forfeiture of the lands or goods of the offender, to which capital or other punishment might be superadded, according to the degree of guilt. (4 Bl. Com., 94, 95; 1 Russell on Crimes, 42.) Certainly there is no intimation to the contrary in Mackin's case, which was put wholly upon the ground that, at the present day, imprisonment in a state prison or penitentiary, with or without hard labor, is considered an infamous punishment. If such imprisonment

> were made the sole test of felonies, it would necessarily follow that a great many offenses of minor importance, such as selling distilled liquors without payment of the special tax, and other analogous offenses under the internal-revenue and customs-revenue laws, would be treated as felonies. * * * By statute in some of the States the word "felony" is defined to mean offenses for which the offender, on conviction, may be punished by death or imprisonment in the State prison or penitentiary; but in the absence of such statute the word is used to designate such serious offenses as were formerly punishable by death or by forfeiture of the lands or goods of the offender.

Reagan v. *United States* (157 U. S., 301) was a prosecution for a violation of section 3082, Revised Statutes, the punishment being a fine not exceeding $5,000 or imprisonment not exceeding two years or both. That statute does not classify the offense. The defendant claimed ten peremptory challenges, but the trial court held otherwise and the case came before this court for review. Mr. Justice Brewer delivered the opinion. After quoting with approval the language of the court in the *Bannon* case and speaking with respect to the classification of offenses, he says (p. 303):

> But in this case we need not refer to the common law for a classification of the offense. Section 2865, Revised Statutes, provides that "if any person shall knowingly * * * smuggle, etc., every such person * * * shall be

> deemed guilty of a misdemeanor. * * * By this section smuggling is *in terms declared a misdemeanor*. The penalty imposed is substantially the same as that by section 3082. * * * The latter offense is subordinate to the former. It therefore can not be an offense of a higher grade.

There is plainly in this a recognition of the right of Congress to classify offenses, and that such classification determines their character for the purpose of fixing the number of challenges allowed under section 819.

In *Considine* v. *U. S.*, 112 Fed. Rep., 342, a prosecution for a violation of section 5478, Revised Statutes, which provided a fine not exceeding $1,000 or imprisonment not exceeding five years, it was contended that the offense charged was a felony, which entitled the defendant to ten peremptory challenges. The statute did not classify the offense. Mr. Justice Day (then circuit judge) delivered the opinion of the court of appeals. After pointing out the changed situation with respect to the test of what constituted a felony, and referring to the classification which, by statute, has been adopted in most of the States, he says, page 345:

> Congress would have relieved the situation of much uncertainty had the general practice in state legislation been followed in dividing crimes according to punishment between the grades of felonies and misdemeanors. As this has not been done, and as there is no definition of felony in the statutes of the United States, its meaning must be ascertained from the construction given to the term in Federal decisions of authority.

> From such authorities certain general rules may be said to have been established. *When a statute says that a certain offense shall be a misdemeanor that fixes its character for the purpose of determining the number of challenges to which the accused is entitled, regardless of the original character of the offense.* (Citing cases.)

Speaking with respect to whether the offence was a statutory one, or one at common law, he continues, bottom page 345:

> The present offense was created by the law of the United States for the purpose of punishing the offense of breaking or attempting to break into a post-office or post-office building with the intention to commit therein larceny or other depredation, and it is purely a statutory offense, not of common-law origin.

The judgment of conviction was therefore affirmed. An application for certiorari was made to this court, but the petition was denied (184 U. S., 699).

The same rule was expressly announced in *Jewett* v. *U. S.*, 100 Fed. Rep., 832, 840, and in *Tyler* v. *U. S.*, 106 Fed Rep., 137, 138.

In this connection see also *U. S.* v. *Coppersmith*, 4 Fed. Rep., 198, et seq.; *U. S.* v. *Daubner*, 17 Fed. Rep., 794, 795.

The offense for which Senator Burton stands convicted is purely a statutory offense, not known to the common law. In creating the offense Congress had the right to designate it a felony or misdemeanor as it saw fit; and, having designated the offense a misde-

meanor, Burton was only entitled to the number of peremptory challenges provided for that class of offenses by section 819, to wit, three.

But the plaintiff in error is not in a position to avail of this objection. He made the objection simply as a formality before the trial began (Rec., p. 27), being inclined, I suppose, at that time to repudiate technicalities. He never renewed it. To entitle him to take advantage of the point here, he must have exhausted his three challenges and then proceeded to renew the demand by making further peremptory challenges. (*Insurance Co.* v. *Hillman*, 188 U. S., 208, 211, 212; *State* v. *Fournier*, 68 Vt., 262, 266; *Allen* v. *Waddill*, 26 S. W. Rep., 273). The record does not show that he either exhausted his three challenges or renewed his demand. The record fails to disclose any complaint against any juror chosen to try the case; and for aught that appears the defendant was entirely satisfied with the jury as constituted. The right to challenge is the right to reject, not to select a juror; and if from those who remain an impartial jury be obtained, the constitutional right of the accused is maintained. (*U. S.* v. *Marchant*, 12 Wheat., 480, 482; *Hayes* v. *Missouri*, 120 U. S., 68, 71.)

II.

As to the reality of the offense; the indictment, the proof, and the court's charge.

I was technically wrong in denominating Mr. Harlan, a witness for the defense, as an *unwilling* witness, but I was referring to his cross-examination, and he was

unwilling, as well as cautious and reserved toward the endeavor to elicit the terms of the original arrangement with Burton relative to services before the Post-Office Department.

I ask the Court's especial attention to what now follows, showing what the indictment charges and what the proof as to Burton's acts reveals, and how the court applies the law to these essential elements of the case.

The indictment charged that Burton accepted compensation for services between November 22, 1902, and March 26, 1903, rendered to the Rialto Company before the Post-Office Department in a matter pending there in which the United States was interested, viz, the matter being the inquiry whether the Rialto Company had violated section 5480 and a fraud order should therefore be issued, and the services consisting of visits, representations, and statements made to the Postmaster-General and other officers of the Department with the intent of inducing a decision favorable to the Rialto Company on the pending inquiry.

The record shows that Mr. Harlan knew on the train of the first two complaints (Rec., pp. 34–35), because he says so. He was asked (p. 176) by Judge Krum whether at the time Burton was employed he himself knew of the complaints which had been lodged. He answers that he is unable to say positively whether he did or not. On cross-examination (p. 189) he says that he evidently did know when he employed Burton that complaints were pending. Not only were the two complaints specially referred to in argument filed at that time (November 17, 1902), but Fravel's complaint

(pp. 54–56) was also before the Department. On December 29 the Allen complaint was received (p. 36, containing inclosures shown pp. 37–50). On January 17 the Warner complaint was filed (p. 52).

On the train Harlan discussed the Rialto Company's business and its relations to the law (p. 172). Senator Burton asked distinctly in that connection, "How are you going to keep within the Federal law?" and the answer was, "Simply by preventing misrepresentation." It is inconceivable that Harlan did not mention the complaints and inquiry which he knew were pending.

Still referring to the conversation on the train and the view of the relation which it left on Harlan's mind, and in answer to the questions if they wanted information as to whether a post-office inspector had been sent to investigate the Rialto Company, and if there were complaints lodged against that company under the terms of the employment would they feel that they had the right to call upon the Senator at Washington, and in reply to the question whether they did not in fact exercise that right and take that step, Harlan replied (p. 184):

> Now, it seems to me I can best answer that question by saying that if such a condition had arisen I would undoubtedly have addressed an inquiry to Senator Burton, leaving it to him whether he would have acted upon it or not. I have always regarded him as a Senator, Colonel Dyer, and I have respect for him as such.

In Harlan's letter of November 18 (pp. 91–93), after showing Dennis's connection with the Brooks Company and asserting his innocence, he asks Burton to find out whether the Government intends to make a case against Dennis, and says if he can make inquiries he will perform a great service "for us" at this time. Dennis was president of the Rialto Company, which would be served materially by friendly representations in Dennis's favor at the Department.

In Burton's reply (p. 94) he speaks of the first two complaints. His letter is in answer to Harlan's, and if it is not responsive it is not because he had not received Harlan's letter when he wrote it, because he acknowledges that letter. Why should he volunteer anything about complaints unless in pursuance of his arrangement on the train? The fact that he particularizes those complaints and speaks of them as if they were an entirely new matter to his mind and an unexpected find is quite consistent with his previous knowledge that there *were* complaints. Mr. Harlan naturally would not mention the names of complainants in advising Burton in a conversation on the general subject that the Rialto Company was under investigation, and Burton, knowing of complaints in general and an investigation, would naturally enough post to Harlan the precise information which he obtained. The letter shows that Burton assumes he is transmitting information which Harlan already knows. Burton was certainly not surprised at the result of his inquiries. He also says: "I have arranged with the Department to be advised in case any complaints are made against

your company, and have arranged for a hearing if any hearing should become necessary. I have assured the Department that it is the purpose of your company to comply strictly with the law, and that it is your desire to remain at all times in perfect harmony with the Department. No action of any kind will be taken against you without my first being notified, and every opportunity for a full explanation or hearing will be had."

In Harlan's answer to this letter (p. 175) he says that the claims or complaints have been investigated and the local inspector found the actions of our company all right and made a report in its favor. It does not appear that a report was made in the company's favor. It was orally reported by Price, the under inspector, to Inspector Dice, that these two complaints standing alone did not warrant the issuance of a fraud order. See what Dice says (p. 70), and what Price himself says (p. 202).

The same witness (Price) shows (p. 204) that after the Evans and Hout complaints he made inquiry on some complaints that came in during the interval before July. He would "probably go down there," to the company's office, and make inquiry as to their standing and what the condition was. He appears to have gone to Mr. Harlan for all of his information, and to have asked whether they had transactions with the people complaining, and that was about all. Mr. Price does not seem to have been a very vigilant or thorough inspector.

In Harlan's letter of December 2 (p. 135) he shows that the Post-Office investigation of the Rialto Com-

pany had become notorious; that that, in connection with the indictments against Dennis, Garland, and Brooks, would probably bring numerous complaints to Washington, but that they would be able to meet each one of the cases individually and show the Post-Office Department a clean record. He adds: "At your end of the line you will, of course, use your own judgment in handling the situation. We will at all times be glad to observe any request made by the Post-Office Department, or submit to any examination that they may direct." In this manifestly he was not referring to Burton's engagement to defend Dennis, but to Burton's services to the Rialto Company at the Department.

Harlan's letter of December 3 (p. 137) speaks of the Bowman and Shove episode, which deepened the perplexities of the company, and to which he refers when he says: "If the situation gets no worse than it now appears, the Rialto Company will have but little trouble in getting through with the situation. Will keep you fully informed."

In Burton's reply of December 9 (p. 136), in saying that no instructions whatever about the Rialto Company have gone out from the Department, he manifestly means that a fraud order had not been issued. When he says that "there is nothing in this office against you at this time," he means that. The next sentence of the letter shows that he is fully aware of the complaints sent forward to St. Louis, but he regards them as not in the Department, but in the hands of Mr. Dice. It is in this letter that he says: "I will

take care of things at this end of the line. Please keep me constantly advised."

When Burton saw the officers of the Post-Office Department on December 16 (pp. 118, 119, 141), he had met Dennis with Mahaney the night before at a hotel here. Burton asked about the conduct of the Rialto Grain and Securities Company and the rules governing marginal trading. When he took Dennis to see Cochran the next morning and repeated the assurance that the Rialto Company was endeavoring to do a straight business and that all the trouble arose from the conduct of the Brooks Company, he could not have had the purpose of serving Dennis in respect to the indictment or keeping the Department in good humor with him on that account. The indictment had already been found. Considering its origin, *it* constituted an accusation, or charge, or controversy, or proceeding in which the United States was a party or interested, and therefore Burton could not serve Dennis there consistently with the law. From another point of view, any service rendered to Dennis in respect to the indictment, as suggesting a man unjustly accused whose case ought to be nolle prossed, would have led him rather to the Department of Justice. No; Mr. Burton was serving the Rialto company by this introduction of its president, although he was under indictment, by exhibiting him as a fine man and repeating the assurance that the Brooks company was a bad concern and the Rialto company a good one (p. 141).

I have commented already on the interview between Burton and other counsel and officers of the company at St. Louis on December 24, in reference to which the fact was brought out that other counsel did not wish him to appear on the trial of the Dennis indictment because it might detract from his influence with the Post-Office Department (pp. 178, 186, 228; see also pp. 29–30 of the original brief).

On January 24 occurred the interview with Cochran with reference to surrendering the Brooks company books and records which the Rialto company owned and which were held by Dice for turning over to the State authorities (pp. 141, 143, 222). Since these books were part of the Rialto company's plant in their illegitimate business, and as they appear to have embraced records or lists of addresses in that business all over the country, they might have been a very material aid to the Government inquiry on the fraud order. They were in the hands of the Government authorities. The case against Dennis on the Brooks Company business in the Federal courts, it is true, was over, but Federal indictments were pending against McRae, Garland and Dennis growing out of the business of the Rialto Company (p. 197). The Government might discover the importance of those records in the fraud order inquiry or on these indictments, which were manifestly related to it. It was safer to have the books back in the Rialto Company's possession, and Mr. Burton appears to have secured their return by his persistence.

It is shown by Burton's telegram of February 11 (p. 125) that through his efforts "the Indian Commissioner will wire to-day to see if McGowan is in St. Louis, and will make inquiry of him why he is taking such proceedings." On the same date (p. 139) Burton acknowledges a telegram of Harlan's saying that things were satisfactory between him and Dice—that is to say, the Rialto Company at their end of the line were holding the situation down successfully. He says:

> Be sure and keep me advised if there is anything to do at this end of the line before going away. I have tried to keep the Department in a good humor with Major Dennis, and think I have succeeded.

As the indictment against Dennis was tried, and Dennis acquitted on or about January 14 (p. 179), the reference in this letter to keeping the Department in a good humor with Dennis must of necessity refer to him as president of the Rialto Company and to that company's interests. All of the ways in which Senator Burton kept the Department in a good humor with Major Dennis doubtless do not appear in this record.

On February 25 Mahaney telegraphed Burton and asked him to verify and advise the Rialto Company as to the report that special inspectors had been appointed to investigate the company. Burton made the inquiry. On the same page of the record is his answer that there is no complaint in the Department (which is not responsive to the inquiry of the telegram), and that he will write full particulars by mail. He did so, and that letter, with another confirmatory of his telegram

concerning the standing of McGowan, the Indian agent, with his superiors, was destroyed by Mahaney at Burton's request (p. 122).

The ground upon which Burton wished the letters to be destroyed is shown in the history of the case in my main brief, and reference is made there to the fact that a letter or letters which he had written to Harlan were also destroyed by Burton himself (pp. 180–181)

What does it ordinarily mean when letters are destroyed? That the person procuring their destruction is conscious of doing something wrong. In this case it can only mean—in view of the defendant's protestations that he meant to do nothing wrong at all—a confession that his acts were inconsistent with his words, that he had done wrong and violated the statute. I do not think Mr. Burton feared ordinary public criticism of mere unwisdom and indiscretion on his part as a public representative.

In the interview at St. Louis, on March 26, with Mahaney and McRae (pp. 120, 162), Burton says himself there is nothing pending in the Department of a serious nature against the company; that the situation there is cleaned up. It is for this reason, since he has left Washington and there is nothing more to do, that he terminates his connection with the company.

Is this record a chronicle of slight things, of mere suspicions and inferences on the part of the Government, of unimportant services, innocent in themselves, unrelated to the inquiry pending before the Post-Office Department, and which the law does not forbid?

Remembering these facts, what were the court's rulings during the trial and in the charge to the jury?

As to the initial phase, Judge Adams charged over and over again in different forms (e. g., pp. 33, 51) that the letters of complaint are "the basis of a proceeding. * * * The only question is whether there was an inquiry pending before the Department." "They are admitted simply because they bear upon the question and upon the nature of the inquiry, and for no other purpose" (p. 53).

As to the contract, the court said (p. 98):

> Now, under the law this defendant is not guilty for making a contract to do anything. This defendant is guilty if he receives money, receives any compensation for services rendered before the Department in a matter in which the United States is interested in any way. So that whatever be the true construction of the original contract entered into between the defendant in this case and the Rialto Grain and Securities Company, the question is still open whether as a matter of fact he received money from the Rialto Grain and Securities Company for services rendered before the Department by him. * * *
>
> There is evidence to be left to the jury, not only of importance in itself, but of reasonable inferences that may be drawn from it, from which the jury may even be able to find that the contract contemplated this; and certainly it would not do for the court, in passing upon the admissibility of the evidence, to say that that would not be a fair and reasonable inference,

> neither do I intend to intimate that it would be, but simply that it is a matter for the jury to pass upon what the original contract was between the parties, whether it contemplated in terms actual work in the Post-Office Department or whether * * * the contract was made not to cover services before the Department, but with the actual intention of rendering them. All this must be left to the jury.

Then follows the passage on page 99, in which the court suggests that it is a service if a Senator of the United States goes before an Executive Department and makes representations in favor of a given concern. The court then continues:

> It would not do for the court to say upon the introduction of evidence at this stage of the case that there is no evidence here of any service rendered by this defendant before the Post-Office Department of any substantial character. The question is, What kind of service was rendered by him; was it service by reading, or manual service, or service of his influence?
>
> The next point made is that there is no service here rendered of any kind. I think the letter of the 20th, written by the defendant to Mr. Harlan, rather denies the assertion of counsel. * * *
>
> Therefore, concerning these two features of the question, * * * I do not have any hesitation in saying that there is some evidence of a service being rendered before the Department in a matter pending before that Department.
>
> (P. 104.) The COURT. You may be sure that in the end the court will tell the jury that there

must not only be the receipt of money, but that it must be received as compensation for services rendered and that is all that will be stated to the jury, and the jury will find from the facts in the case.

(P. 138.) The COURT. I will say again, so there may be no misunderstanding as to the view the court has in admitting this testimony, that the letters, telegrams—this letter among others—are admitted to go to the jury to show the relations existing between the defendant in this case and the Rialto Grain and Securities Company with the view of aiding the jury in the determination of the situation which was stated by counsel in their opening as to what his true relation was, whether his relation was aiding, assisting, and rendering service before the Department, or whether his relation was entirely exclusive of that and for the purpose of acting as general counsel upon the situation. That is the sole ground upon which this letter and other letters have been admitted.

(P. 166.) It is not one transaction within the meaning of section 1782 which is involved in this case. The gist of the offense * * * is the receipt of money, the receipt of compensation; the receipt of $500 at one time for services, *if they were rendered* [italics mine], * * * would constitute an offense in and of itself. So the receipt of another $500 would be an offense in and of itself. That is the view I take of it.

(P. 195.) What I understand is finally to be submitted to the jury is whether the services were rendered in the Departments or not. It is

proper to find out what services he rendered as bearing on the question to be finally submitted to the jury.

Taking up the charge now, the court left to the jury the questions whether an inquiry was pending, as to whether the Rialto Company was violating the postal laws to enable the Postmaster-General to determine whether he should issue a fraud order, whether the accused knowingly accepted at St. Louis from the Rialto Company compensation for services of the kind set forth in the counts. The court left to the jury to determine whether the checks were paid to Burton at St. Louis or Washington (pp. 237–238).

The court called the jury's attention to the sharp issue of fact, viz: Whether the services were rendered before the Post-Office Department, or whether they were general professional services (p. 239). "Notwithstanding the fact that the accused was a Senator of the United States, he had the legal right to practice his profession in any and all of its phases, and to receive compensation therefor in any way and manner, except that he could not receive compensation for services rendered before the Post-Office Department in any matter pending there in which the United States was interested."

> And in fact the law does not prohibit him from merely rendering services in such matters before the Department. The only prohibition in this respect is against receiving compensation for such services and thereby putting himself into such relations with and under such obliga-

> tions to the person from whom such compensation is received as are usually created by that act. In determining whether he received the compensation for the services * * * before the Department, or whether he received the compensation * * * for other services, you have before you the evidence of many witnesses, correspondence between the accused and officers of the Rialto Grain and Securities Company, and all the other facts and circumstances brought out in evidence, together with all fair and reasonable inferences which may be drawn from them. * * *
>
> It is immaterial whether the services if rendered were apparently or really antagonizing or opposing the Government, or whether they were apparently or really in harmony with the interests and purposes of the Government. * * * The intent and meaning of the law obviously is that if a Senator goes before the Department to render service there to anyone in a matter pending there in which the United States is interested, he shall be under no obligation inconsistent with his rendering absolutely disinterested services in such matter. (pp. 239–240).

The court thus held the jury down to the indictment, to the inquiry before the Department, its purpose and probable result, to services in that connection, and therefore where on p. 240 it is said: "The real issue, that is, whether any services were rendered by the accused before the Department for which he received compensation," it is preposterous to suggest

that the door was opened wide to *any* services. The court meant, of course, services under the limitations which it had just expressed a moment before.

The court then proceeds to charge carefully and fully regarding the presumption of innocence, the burden of proof, and reasonable doubt. The court granted most of the defendant's requests to charge (pp. 242–244), and one of them is as follows (p. 243):

> Before defendant can be held guilty of the charge against him, *it must be proved* that he did something in connection with the investigation of the Rialto Grain and Securities Company by the Postal Department intended to influence the action of some official of that Department with respect to such investigation, and that defendant was paid and received compensation for so doing.

The court granted, among others, the following request of the defendant to charge, which plainly implies that this particular inquiry was a matter pending before the Department in which the United States was interested (p. 242):

> That whether the defendant can be adjudged guilty * * * depends upon his having received compensation for a service rendered * * * in seeking to prevent the issue of a fraud order. * * * The service must have been rendered in the Post-Office Department before some officer charged with the matter of inquiry, and must have been intended to induce such officer to report favorably upon the matter before him, or to decide some question touching a pro-

> posed or contemplated fraud order favorably to the company. The offense consists in the rendition intentionally of the service indicated and the receipt of compensation knowingly for the service so intentionally rendered.

That request then goes on to state the privilege of the defendant to make inquiries in regard to complaints, and to make reports to the company, and emphasizes again the necessity that his acts must have been intended to prevent the issuance of a fraud order, in order to show guilt.

It seems to me that this first request of the defendant to charge unconsciously concedes that an inquiry within the statute was before the Department. For it can not be doubted that at the outset a *prima facie* case leading to a fraud order was made out, and that such result was contemplated and was the object of the inquiry.

Now, it is true that the court denominated this request and the other requests of the defendant which were granted as embodying abstract propositions of law. The court's exact language is as follows:

> These are abstract propositions of law, which I give in connection with the charge *as perhaps more fully amplifying it.* I am willing to give them inasmuch as they are asked and they contain general propositions of law.

In other words, the court incorporated and merged these requests in the general charge. When he spoke of amplifying the charge thereby, he indicated plainly enough that there was no qualification or distinction

against the requests. They went to the jury and were considered, and no objection was made to this comment of the court. In asking to have the court repeat them, after the specific instructions to the jury on their return, the plaintiff in error, while indicating a general objection to that qualification of their requests—if it be a material qualification—did not except on that ground (p. 252). At all events, the court had told the jury that the requests were just as much a part of the charge as that which had been read as emanating from the court itself, and the learned judge simply refused to let the jury go back with all the accent of the case resting on a restatement of the defendant's requests.

When the jury came back (p. 246) a juror was under the impression that since Burton was employed as general counsel, such fact did not prohibit him from rendering "such service" before the Post-Office Department; what service? Why, manifestly, service such as was charged by the indictment and such as was proved. Therefore the court was entirely justified in making it clear to the jury, as was done (and a touch of asperity would not have been improper), that it was not meant that if Senator Burton was employed as general counsel, that fact permitted him to render services before the Department [that is, as I have just pointed out, services in reference to the pending matter, and to influence the action of the Department officers] for which he was to receive and did receive compensation.

> It is undoubtedly an incorrect understanding of the law, as well as of the plain meaning of the statements of the charge, to say that merely because the accused was employed as general counsel he had the right to render such services before the Post-Office Department. He had the right to go before the Post-Office Department, as I said, in substance, in the charge several times, in such a way and manner as is consistent with the principles of the law. He could go there and answer questions and make suggestions with regard to any matter that was pending there, provided he did it in a free and independent way, unaffected by the fact of receiving compensation. It would not seem that it is necessary to make further comments with respect to that matter at all (p. 248).

Considering the way in which the question came up, that is, through the sequel of the jury's return, the language of the court on page 249 is not justly open to challenge; certainly it is no ground for reversal.

Immediately afterwards (p. 250) the court said:

> The very thing which is before the jury to be considered is whether there was anything pending. It is not permitted under the law for a Senator to go before the Department when such an inquiry is made, with a view of affecting the action of the Department in the slightest way, as charged in the indictment. That is the point. I do not think the jury fully read the charge and all the instructions of the court and heeded them when such a question as this is suggested as the basis of difficulty at arriving at a verdict in the case.

And (p. 251), quoting the language of the opinion of this court in *United States* v. *Allen* (164 U. S., 492, 501), the court, rightly enough, said:

> The communication from the jury rather suggests to my mind not a failure to apprehend the law as it was laid down by the court, but it seems to be rather a disposition to think that what was laid down by the court is not or ought not to be the law.

When the thought in the inquiring juror's mind is regarded, viz, the thought that because Senator Burton was general counsel of the company he could do what he pleased, despite the facts proved and the law, this comment of the court, although hardly a rebuke, was a salutary reminder of the jury's duty.

I desire also to call the court's particular attention to the other language of the trial court on this essential feature of the case, viz, the actual commission of the substantive offense, as shown by the opinion denying the motion for a new trial in paragraphs third, fifth, and sixth (pp. 286, 287, 288 of the record). The trial court's vindication of its supplemental instructions and action upon the return of the jury (pp. 289–292) is complete and unanswerable.

I submit that when the fair import and intent of any one of Judge Adams's statements of the law is scrutinized in the light of the facts proved, and in connection with the context, no objection whatever can be found. I submit that when his whole series of rulings and his entire charge are regarded without

emphasizing or separating particular portions, it can not justly be said that he misled the jury or imposed and enforced upon them unsound propositions of law. That objection is as unfounded as the complaint that the jury was swayed by passion and prejudice (p. 278).

The gist of the offense was the receipt of compensation—not for *any* service by the individual, but for services by a Senator of the United States to the Rialto Company before the Post-Office Department in a matter pending there in which the United States was interested, viz, whether the deceiving and injurious business of the Rialto Company was imposing a fraud upon the people partly through the use of the mails, and a fraud order should therefore be issued. That was what Judge Adams meant in accentuating the receipt of compensation as the gist of the offense—as the final and completing act—and that was what our reference to his language meant.

III.

As to the meaning of the law; its enumeration and limitation.

A criminal law, as much as any other, must be interpreted according to the fair and reasonable import of its words. The intent must be found in the language. "To determine that a case is within the intention of a statute, its language must authorize us to say so" (*United States* v. *Wiltberger*, 5 Wheat., 76). But—

> Though penal laws are to be construed strictly, yet the intention of the legislature

> must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature. (*United States* v. *Lacher*, 134 U. S., 624.)

There can be no doubt, generally speaking, of the intent of Congress to make this statute far-reaching and comprehensive. Examining it rigidly, however, we find that the field on which the prohibition operates is a series of enumerated things, transactions or occurrences, in which the United States is a party or interested. They all must be pending before a Department. If, notwithstanding the enumeration, the included content is broad enough to embrace *everything* in the way of pending business in a Department in which there may be interests adverse to the United States, or whether strictly adverse or not, in which services to outside parties may be rendered, why should it be surprising that in no case whatever shall compensation be allowed from such private parties to a Government officer?

Congress was striking at an evil, and in the endeavor to make the blow telling, and yet generally to define its chief manifestations, may have circumscribed so broad a territory as to cover all current business. But why not—the services to be for compensation and Government officers to be prohibited? Yet the mind naturally seeks some meaning in the enumeration, and thinks there must be some principle of limitation. What is it? That is an experimental and speculative inquiry

after all; this case does not demand it and is well within a strict view of the categories, because it certainly exhibits a proceeding or charge or matter in which the United States is interested.

Nevertheless, in this matter let us try to point out, without expecting to resolve all possible doubts, what sort of matters are included in the specification.

First. The words used and their arrangement are not such as to lead inevitably to the view that there is a principle of distribution, the United States being regarded as a "party" even in its own Departments where the matter is criminal in nature ("accusation," "arrest," "charge"), and as interested where civil ("contract," "claim," "proceeding," "controversy"). For some of the words at least are used generally rather than technically and pass over from one division to another, or apply to both. Thus "accusation" does not necessarily or exclusively mean indictment, and might refer to a matter civil in nature and consequences; so as to "charge;" while "controversy," which ordinarily implies some dispute of a civil rather than criminal nature, might, however, include a thing which reaches into crime and prosecution.

So as to "proceeding." Usually or on the whole civil in meaning, that word is also used as to criminal prosecutions. Here was a proceeding pending before a Department surely enough—a controversy truly enough, in one sense between the Government and the Rialto Company, in another between that company and the complainants, who thought they had been

swindled or that they or others were likely to be, the controversy being whether the company was in fact doing a straight business, as its supporters alleged.

Second. The United States, it seems, is a party in the strict sense in court-martial proceedings. The United States is a party also in the Court of Claims, and those cases are pending, until finally decided, in the Department of Justice, too. If there were a criminal prosecution and submission of a request to nol-pros, either to the Attorney-General or to a United States attorney, that matter or thing in which the United States is a party would be pending *pro hac vice* before the Department of Justice.

Third. The final phrase, "other matter or thing," reaches out beyond the enumeration, and says, in effect, "if there is anything which this enumeration has omitted before a Department, in current business not disposed of, in which private parties may be served for compensation, a Federal officer or employee shall not represent them as clients and receive, or agree to receive therefor, any compensation whatever, directly or indirectly, for any services rendered or to be rendered."

There is a hint to be borrowed here from customs law in which frequently there is an enumeration followed by an omnibus clause, and where the word "including" is sometimes used to specify particularly that which belongs to the genus, and is sometimes used to add to the general class a species which does not naturally belong to it. (*Hiller* v. *United States*, 106

Fed. Rep., 74; *In re Merchandise*, etc., 75 Fed. Rep., 998; *Hills Bros.* v. *United States*, 99 Fed. Rep., 264.)

But, after all, when the proceeding or matter or thing before the Department is a regular inquiry, duly initiated under the law and regulations to determine whether statutes have been violated, and whether either the administrative or the criminal remedy or both shall be applied, can these general and speculative doubts as to the whole extent and precise limits of the law lead us to say that there was nothing pending under the enumeration in which the United States was interested?

IV.

As to the nature of the required "interest."

I think my original brief says sufficient about the abstract concerns, manifestly concerns of the greatest moment, in which the United States is vitally interested. I also said that some of these intangible interests often run to a property or money interest, if not immediately and visibly, yet ultimately. Thus fraud in imposing an unfit clerk on the Government would give less efficient service, and it does not require abstruse mathematics to see that that affects the United States Treasury. But there is, as was suggested by a question from Mr. Justice Holmes, a much clearer application of that idea here.

Inasmuch as a fraud order stops mail matter and cuts off certain letters (registered letters) to an offending addressee, who often is in a large way of business, the

revenues of the United States are diminished and its property interests are concerned. The Government is interested in that narrower sense. Again, since a fraud order proceeding may very likely lead to prosecution under section 5480, that result being always contemplated as possible in such inquiries, and as the punishment under that section includes a fine of five hundred dollars, there, too, the United States is interested in the limited sense. A very considerable part of the Government revenue is made up of fines, penalties, and forfeitures.

No branch of any Executive Department more closely affects the people than the postal service. It is the great artery and vehicle of communication between the people. It is the means and agency of the people in conducting many and varied enterprises. Congress has in appropriate legislation recognized the great opportunity afforded unprincipled, dishonest, and evil-disposed persons to carry out their various schemes through the medium of this Government agency, by imposing upon the Postmaster-General the all-important duty of purging the mails of all such schemes. He does this "on evidence satisfactory to him." Congress has provided him with certain representatives, namely, post-office inspectors, whose duty it is, among other things, to gather this evidence. The Postmaster-General must of necessity rely largely upon the report of these inspectors.

When complaint is made that the mails are being used in furtherance of a lottery or scheme to defraud,

if such complaint is found to make out a *prima facie* case, it is turned over to an inspector for investigation and report.

From that moment there is a matter pending before the Department in which the United States is vitally interested, namely, whether or not a fraud order, so-called, shall issue. Can it be successfully maintained that a member of Congress may appear before the chief post-office inspector in the capacity of a paid attorney, and through his influence obtain from that official a report favorable to his client, and not violate this law?

It will probably be conceded that if he should appear before the Postmaster-General in the capacity of a paid attorney and argue against the issuance of a fraud order, he would in so doing violate the law. How, then, can it be contended that he does not violate the law by appearing before a subordinate while the case is in process of investigation, when by so doing his influence may be more potent and fruitful than it would be at any other stage of the proceeding?

The United States is interested in such an investigation and proceeding also for the reason that under the law the use of the mails in furtherance of a lottery or scheme to defraud is a crime. This is well known to the public, who accept the fact that any person or company is permitted to use the mails as *prima facie* evidence that such person or company is conducting an honest enterprise. Obviously the United States can not consistently permit the use of its mail

service in the dissemination of literature concerning lotteries or schemes to defraud when in so doing it would indirectly be a party to the fraud.

In the case of *McGregor* v. *United States*, recently decided in the circuit court of appeals for the fourth circuit (not yet reported), McGregor, an employee of the Government, had been convicted for conspiracy to defraud the Government by the acceptance of part of the purchase price of a certain article sold the Government through him. It was contended that, since the price paid by the Government for this article was no more than would have been paid for a similar article of no better grade or value, the Government was not defrauded. The court held otherwise, and said:

> It may be true that no pecuniary loss would follow the consummation of the conspiracy, and still the result might be that the damage to the Government would be serious and far-reaching. The language of the statute clearly contemplates that the loss or damage may be other than a pecuniary one, susceptible of accurate calculation. The words "in any manner or for any purpose" [sec. 5440, R. S.] are most comprehensive and show that the intention of the lawmaking power was to have the statute as broad and as comprehensive as it could possibly be. It surely is a wrong, and a great injury to the Government, when any officer or employee of one of its Departments conspires with another to do an act the inevitable result

of which will be to corrupt the efficiency and impair the usefulness of such Department.

To hold that such conduct would not be a fraud upon the Government and a loss to it would be as reprehensible as such conduct itself. This statute has, in a number of well-considered cases, been given the construction placed upon it by the court below, and such construction has our approval.

United States v. *Bunting et al.*, 82 Fed., 883; *United States* v. *Curley et al.*, 122 Fed., 738; *Colladay* v. *Palmer*, 18 App. (D. C.), 426; *Tyner and Barrett* v. *United States*, App. (D. C.).

I said nothing in aspersion of the eminent Senators and lawyers whose names were mentioned at the oral argument and who took part in the debate on the original law and endeavored to prevent the manifest injustice of forbidding practice by members of Congress and other public officers before the courts; that is, before the *judicial* department of the Government. I said that the law—meaning the general scheme and purpose of the law—was extorted from an unwilling spirit by the better sentiment, and I think that is true.

V.

As to intangible influence.

It would be either a very thoughtless thing or a serious and unworthy thing for a Senator of the United States, being counsel for a railway company (I refer to one of the suggestions from the bench), to send his card showing that relation to the head

of a Department in which his company had pending business which could be served. But the mere sending of such a card would not be *service*, I think, within the meaning of the law (practical and substantial always), although the intent of such Senator might be covert and evil. It would hardly do to file an indictment on that alone. Here there was far more—a series of connected acts, no one of them slight and unimportant, an insidious and subtle course of dealing which distinguishes the case of the actual Senator from the supposed one not only in degree but in kind.

There were visits, inquiries, representations, arrangements for hearings, "looking out at this end of the line," persistent championing of the Rialto Company's interests, so that no one engaged in that branch of the Government service could fail to know that a powerful, assiduous, and watchful Senator was the counsel of the company; was assuring the Department that they were doing a "straight" business, that they would comply with the rules; was keeping the Department in good humor with Dennis, the president; was implying at least that complaints were unfounded, because the essential inference from his inquiries about the bogus inspectors was that the company was, of course, all right and such people were merely trying to blackmail it. Would not these things, and the other similar activities shown by the record, naturally influence the Government officers?

They did influence the officers, and although a fraud order ought to have been issued promptly it was not,

owing to Senator Burton's interposition. For all the ignorance of the Senator (as claimed) of the string of complaints after the first two, his protest, that he will not appear before the Department or sustain his clients against the will of the Department, and notwithstanding the assertion of mere "inquiries," cautious and proper, he tells Mahaney in McRae's presence, who confirms the statement, that everything is cleaned up at Washington, that there is nothing pending before the Department against the company of a serious nature.

Mr. Burton's traces were well covered. His assertions on behalf of himself and his client make a fair outside, but he held up the investigation because he was Senator, and not only because he was general counsel of the Rialto Company; and the portions of the judge's charge animadverted on at bar were perfectly accurate and just. If not, the most dangerous evil in this entire situation, viz, that intangible, subtle, and insidious thing, "influence," can never be reached even where the receipt of compensation is plainly shown.

VI.

Jurisdiction here and below, and section 731, Revised Statutes.

AS TO JURISDICTION IN THIS COURT.

I may have gone too far in stating in my original brief that there was not a shred of reason for contending that a constitutional question was presented justifying a direct appeal under section 5 of the judiciary

act of 1891. It may be that I gave too little attention in that connection to the question of privilege; but I repeat that it was waived—that they gave it away too prodigally, so to speak—and now are attempting to recall it and set it up as a ground for immediate review in this court.

The assignments of error do not specify it, and while it appeared in the motion in arrest of judgment and the grounds thereof were formally saved by an assignment alleging error in overruling it, I contend that this is not enough to make that question a ground for taking jurisdiction. If the court think otherwise, or if the court see fit to issue certiorari at this stage, there is an end of the question.

AS TO JURISDICTION BELOW.

In *Horner* v. *United States* (143 U. S., 207), Mr. Justice Blatchford, delivering the opinion of the court, after setting out section 731, said (p. 212):

> The words "judicial circuit" in that section are probably printed by a clerical error for "judicial district," as, in section 30 of the act of March 2, 1867 (c. 169, 14 Stat., 484), from which section 731 is taken, the words are "judicial district."

The mistake was regarded as so apparent that both in *In re Palliser*, 136 U. S., 257, 266 (Mr. Justice Gray), and *Putnam* v. *United States*, 162 U. S., 687, 708 (Mr. Justice White), the court, in setting out the statute, substitutes the word "district" therefor.

In the Compiled Statutes of the United States, volume 1, page 585, the compiler, in a note to section 731, states that the word "circuit" was used by mistake.

If the change had been deliberate and intentional, Congress would hardly have omitted to change the word "district" in the succeeding clause, "may be dealt with, inquired of, tried, determined, and punished in either *district*."

Besides, no sensible reasoning can be offered for such a change. Counsel for plaintiff in error attempt none. The constitutional provision as to trial refers to the "district" where the crime shall have been committed, not "circuit."

Section 731 does not occur under chapter 5, "Judicial circuits," of Title XIII, as the brief of plaintiff in error indicates, but under chapter 12, "Provisions common to more than one court or judge."

In *United States* v. *Haskins*, 3 Sawy., 262; Fed. Cas. 15322 (1875, district court, D. California), it was held that a removal might be made from a district within a State to a district within a Territory under section 33 of the judiciary act of 1789, now section 1014 of the Revised Statutes. In that case Judge Hillyer said:

> Thus these courts [circuit and district courts of the United States and Territorial "district courts," referring to the organic act of Utah] have cognizance of all offenses committed in their respective districts, and as such an offense can only be tried in the district where it is committed, the offender, if he escapes from the Ter-

ritory, must go unpunished unless he can be removed there for trial; and this only can be done under and by virtue of the provisions of the judiciary act. No other provision of law for such a case can be found, and it does not seem probable that Congress has left it wholly unprovided for.

Again:

It is doubtless true that the provisions of the judiciary act are, for the most part, confined in their application to courts of the United States in the sense of the Constitution. In *Hornbuckle* v. *Toombs* (18 Wall.), it was held that the clause in the organic act of a Territory extending the laws of the United States over the Territory had the effect to import laws of a general character and universal application; but whether, when acting in the capacity of United States circuit and district courts, invested with the same jurisdiction in all cases arising under the Constitution and laws of the United States, the Territorial courts were to be governed by any of the regulations affecting the circuit and district courts of the United States was a question stated but not decided. Now, the provisions of section 33 are of universal application, and are plainly intended to cover every offense against the United States committed within the jurisdiction of any of its courts.

This reasoning applies with equal force to the present case.

The act of February 21, 1871, chapter 62, section 34 (16 Stat., 419, 426), providing a government for the District of Columbia, contained this provision:

> The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the District of Columbia as elsewhere within the United States.

This provision afterwards became section 93 of the Revised Statutes of the District of Columbia.

By section 1 of the act of March 3, 1901, c. 854 (31 Stat., 1189), establishing a code of law for the District of Columbia, it is provided that certain statutes shall remain in force in the District, among others, "*all general acts of Congress not locally inapplicable in the District of Columbia*, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States."

By section 61 of the District Code (31 Stat., 1199) it is provided that the supreme court of the District of Columbia—

> shall have the same powers and exercise the same jurisdiction as the circuit and district courts of the United States, and shall be deemed a court of the United States, etc.

There is every reason, therefore, for holding that section 731 is applicable to the District of Columbia. It is a judicial district, and both as regards jurisdiction and power the supreme court of the District of Columbia is in all respects similar to the circuit and district courts of the United States.

As the district court held, the gist of the offense is the receiving of compensation. The place where compensation is received is therefore the place where the

offense is completed. There has never been any doubt that where an offense was begun in one district and completed in another, it could be tried in the latter district.

In *Palliser's case* (136 U. S., 257), Mr. Justice Gray, delivering the opinion of the court, said (p. 265):

> It is universally admitted that when a shot fired in one jurisdiction strikes a person in another jurisdiction the offender may be tried where the shot takes effect, and the only doubt is whether he can be tried where the shot is fired [citing cases].

The plaintiff in error was not tried in the District of Columbia for an offense alleged to have been begun here and completed elsewhere, but he was tried in the eastern district of Missouri for an offense *completed* there, and, in the eye of the law, independent of section 731, committed there.

If the payment of the checks in question was not made in St. Louis, but at Washington, as plaintiff in error contends, then the district court had no jurisdiction upon any ground, because in that case, since the services were rendered before the Post-Office Department at Washington, the offense would have been entirely consummated here. But the Government contends that, as stipulated, the checks were *paid* at St. Louis. Besides, there is no question that the last payment was made in cash at St. Louis.

On this branch of the case two questions were asked at the oral argument by members of the court, to which I desire to refer further. Referring to the argu-

ment that under the banking custom proved, by which the Riggs Bank was Burton's agent for collection, notwithstanding the immediate credit, and the checks were paid to Burton at St. Louis, Mr. Justice White inquired whether the amount of the check could have been set off as against the Riggs Bank by the Commercial Trust Company in case Burton was indebted to the Trust Company.

If the Riggs Bank were collection agent, as we contend, that could have been done. If it had been attempted, I have no doubt a lawsuit would have resulted. The Riggs Bank, however, on notice through the series of collecting banks that the Commercial Trust Company had applied the amount to Burton's indebtedness and would not account through the clearings, would have accepted this result of its relation as agent readily enough, I surmise, would have charged the item back and been sued by Burton, probably, on the theory of a sale. I imagine they would not have risked an overdraft or ever given immediate credit if Burton's balance were low and his credit weak.

But despite the hypothetical case the fact remains that we proved the usage, and under the usage the check was paid at St. Louis to the payee by the drawee at St. Louis through the Riggs Bank as agent for collection.

Mr. Justice Day asked what would have been the situation under our theory—that is, was Burton paid, and could we have prosecuted him—if payment of the

check had been stopped or the drawee bank had failed. The answer to that question, I think, is this: There would not have been payment at St. Louis, of course, and the district court there would not have had jurisdiction. The item would have been returned and charged back to Burton's account, and he would have had a right of action in the respective cases either against the drawer or against the assignee or receiver of the drawee. The Government would then probably have proceeded against him in Washington. There would have been no *payment*, no receipt of the money on that item at St. Louis, but a thing of value would have been received at Washington. The language of the statute is "receive or agree to receive *any compensation whatever, directly or indirectly.*" Compensation may be other than cash, and may not require technical *payment.*

It may be other than a demand banking item, which ordinarily is paid somewhere in due course. In that case it would turn out that the intention was apparently abortive, but Mr. Burton would have received in Washington property, a thing of value having a right of action attached to it, and pending his endeavor to enforce payment of his check the Government would probably have sued him in the District of Columbia.

But are we bound to pursue the speculative inquiry to these remote ends? Is the logic of our main position unsound because some doubts might be expressed as to all its possible consequences? Proving the usage

as to a transaction in which the check *was* paid, can we not stand on that payment even if in other imagined events a conflict of interest might challenge our theory in the courts?

It must not be forgotten that the *cash* was paid to Burton in person at St. Louis. Additional authorities on the point that one good count will sustain a judgment of conviction are: *Claassen* v. *United States*, 142 U. S., 140; *Evans* v. *United States*, 153 U. S., 584, 595, 609; *Goode* v. *United States*, 159 U. S., 669; *Ballew* v. *United States*, 160 U. S., 197; *Selvester* v. *United States*, 170 U. S., 262, 267, 268; *Putnam* v. *United States*, 162 U. S., 687.

VII.

Is the Privilege purely personal, or is the Public interested?

Mr. Justice Peckham asked the question whether the constituents of a member of Congress are not interested in his presence at duty and without interruption in the Senate or House, thus suggesting a doubt as to whether the privilege is merely personal and competent to be waived. Constituents *are* interested in being represented in the legislature at all times during a session, but they are first of all interested in being properly represented, and a man under indictment is not fit to represent them. Therefore, the public as well as the individual is also interested in having the privilege waived and the charge determined as promptly as possible, and no doubt that obvious motive is one reason why Senator Burton himself urged immediate trial.

Furthermore, promptness and waiver are requisite for another practical reason. It is understood to be an unwritten law of the Senate that it will *not* take action within its own power to discipline or expel a member, only in case a member under indictment does not appear on the floor of the Senate while any such charge in the courts remains undetermined in his favor. Two courses only are open to a Senator in such case, either to waive the privilege and proceed immediately to trial on his own initiative, or else to resign and give the electors an opportunity to select a representative who is fit.

HENRY M. HOYT,
Solicitor-General.

O

Supreme Court of the United States.

No. 343.—October Term, 1904.

Joseph Ralph Burton, Plaintiff in Error, *vs.* The United States. } In error to the District Court of the United States for the Eastern District of Missouri.

[January 16, 1905.]

The plaintiff in error having been convicted in the District Court of the United States for the Eastern District of Missouri of a violation of the Revised Statutes of the United States, sec. 1782, (1st U. S. Comp. Stat., p. 1212,) and set forth in the margin,* has brought the case here directly from that court by writ of error.

The defendant was a member of the Senate of the United States, representing the State of Kansas. The indictment under which he was tried contained nine counts. The first count, after averring that the defendant was a Senator from the State of Kansas, averred that on the 26th day of March, 1903, he received at St. Louis, Missouri, from the Rialto Grain and Securities Company $500 in money, as compensation for his services theretofore on November 22, 1902, and on divers other days between that day and the 26th day of March, 1903, rendered for the company before the Post Office Department of the United States, in a certain matter then and there pending before that department, in which the United States was directly interested, that is to say: Whether the company had violated the provisions of section 5480 of the Revised Statutes of the United States, in that the company had through its officers devised a scheme and artifice to defraud, which was to be effected through correspondence by means of the post office estab-

*1 U. S. Comp. Stat. 1212.

Sec. 1782. No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States.

lishment of the United States, and whether the correspondence of the company at St. Louis, Mo., should not be returned with the word "Fraudulent" plainly written or stamped upon the outside, as authorized by law. It is also averred that the services rendered by defendant to the company consisted in part of visits to the Postmaster General, the chief inspector, and other officers of the Post Office Department, and of statements made to the Postmaster General, the chief inspector, and other officers, which visits and statements made by the defendant were made with a view and for the purpose of inducing the Postmaster General, the chief inspector, and other officers to decide the question then pending before the Post Office Department in a way favorable to the Rialto Company. The second count of the indictment was the same as the first, except that it averred the United States was "indirectly," instead of "directly," interested in the question as to whether or not a "fraud" order should be issued. Upon the third count the jury rendered a verdict of not guilty. Upon the fourth and fifth counts the Government entered a *nolle prosequi.* The third, fourth and fifth counts concededly charged but one offence, which was the same as that charged in the first and second counts, and all of these counts were based upon the payment of $500 in cash to defendant at St. Louis on the 26th of March, 1903. The sixth count averred the receipt by defendant at the city of St. Louis, in the State of Missouri, of a check for the payment of $500, which was received by the defendant on the 22d of November, 1902, the check being drawn upon the Commonwealth Trust Company of St. Louis, payable to the order of the defendant and by him duly endorsed, and such check was paid by the Trust Company to defendant at St. Louis, as compensation for his services to the company between the 22d of November, 1902, and the 26th of March, 1903, before the Post Office Department, in a matter in which the United States was directly interested. The count then contained the same averments of the character of the question pending before the Post Office Department as are set forth in the first count. The seventh count is the same as the sixth, except that it averred the making of a check and the payment thereof to the defendant on the 15th day of December, 1902, at the city of St. Louis, in the State of Missouri, for the sum of $500; all other averments being the same as the sixth count. The eighth count averred the giving of a check for the sum of $500 on the 22d day of January, 1903, at the city of St. Louis, in the State of Missouri, in payment of services of the same nature as stated in the sixth and seventh counts. The ninth count is the same as the sixth, seventh and eighth, except that it averred the receipt of a check by the defendant, dated the 16th day of February, 1903, at the city of St. Louis, in the State of Missouri, for the same class of services and upon the same matter then pending before the Post Office Department. The defendant demurred to the indictment on the ground that it stated no crime, and that it showed that the

United States had no interest, direct or indirect, in the matter before the Post Office Department, inasmuch as the interest of the United States, under the statute, must be either a pecuniary or property interest, which may be favorably or unfavorably affected by action sought or taken in the given matter pending before the department. The demurrer was overruled, and the defendant then pleaded not guilty.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

Counsel for defendant base their right to obtain a direct review by this court of the judgment of conviction in the District Court of Missouri upon the contention that the case involves the construction and application of the Constitution of the United States in several particulars. They insist that under article 3, section 2, of the Constitution, and also under the Sixth Amendment of the same, the defendant was entitled to be tried by a jury of the State or district in which the crime alleged against him in the indictment was committed. This question arises by reason of those counts of the indictment which charge the receipt by defendant of various checks therein set forth, at St. Louis, in the State of Missouri, while the evidence in the case shows, without contradiction, that the checks were received in the city of Washington, D. C., and payment thereof made to defendant by one of the banks of that city. Counsel contended that if any crime were committed by the receipt of these checks and the payment thereof to the defendant, (which is denied,) that crime was committed in Washington and not in Missouri, and that it did not come within section 731 of the Revised Statutes of the United States, providing that when an offence against the United States is begun in one judicial circuit and completed in another it shall be deemed to have been committed in either, and may be dealt with, etc., in either district, in the same manner as if it had been actually and wholly committed therein. Counsel for defendant also contend that the case involves the construction and application of section 6 of article 1 of the Constitution of the United States, providing that Senators and Representatives shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses and in going to and returning from the same. These questions were raised in the court below. Whether the defendant waived his alleged privilege of freedom from arrest as Senator would probably depend upon the question whether the offense charged was in substance a felony, and if so, was that privilege a personal one only, and not given for the purpose of always securing the representation of a State in the Senate of the United States. However that may be, the question is not frivolous, and in such case the statute grants to this court jurisdiction to issue the writ of error directly to the District Court, and then to decide

the case without being restricted to the constitutional question. (*Horner v. United States*, No 2, 143 U. S. 570.) It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. Having jurisdiction to decide all questions in the case on this writ of error, we deny the motion for a certiorari, and proceed to an examination of the record.

First. The question of the construction of the statute upon which this indictment was framed is the first to arise. Upon that question a majority of the court (Mr. Justice Harlan, Mr. Justice Brown, Mr. Justice McKenna, Mr. Justice Holmes and Mr. Justice Day concurring) are of opinion that the facts alleged in the indictment show a case that is covered by the provisions of the statute, while the Chief Justice, Mr. Justice Brewer, Mr. Justice White and the writer of this opinion dissent from that view, and are of opinion that the statute does not cover the case as alleged in the indictment.

Second. Assuming that the statute applies to the facts stated in the indictment, a further question arises upon the general merits of the case, whether there was sufficient evidence of guilt to be submitted to the jury, and a majority of the court (the same Justices concurring) are of opinion that there was, or are not prepared to say there was not, and the same minority dissent from that view and are of opinion that there was no evidence whatever upon which to found a verdict of conviction.

There are, however, other questions remaining, which we now proceed to discuss on the theory that the statute covers the case.

Third. The sixth, seventh, eighth and ninth counts of the indictment aver the receipt by the defendant of the different checks described, at the city of St. Louis, in the State of Missouri, and the payment of the money thereon to the defendant at St. Louis, in that State, as compensation for services theretofore performed by the defendant for the Rialto Company. It may be assumed that on the facts averred in these various counts in the indictment upon the checks, each of them was good. It turned out, however, on the trial that these averments of the place where the different checks were received and paid were not true; but, on the contrary, the evidence was wholly undisputed that each of them was received by the defendant in the city of Washington, D. C., and by him there endorsed and deposited with the Riggs National Bank of Washington, D. C., and that they were afterwards duly paid by the Commonwealth Trust Company at St. Louis, Missouri; that the amount of each was in each instance immediately credited by the Riggs National Bank to the account of the defendant with the bank, and the cashier testified that the defendant had the right, immediately after the credit was made, to draw out the whole, or any portion thereof, without waiting for the payment of the check at St. Louis.

There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, endorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the Trust Company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank when a check was not paid, or charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the endorser of the check, and nothing more. There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated. The forwarding of the check "for collection," as stated by Mr. Brice, was not a collection for defendant by the bank as his agent. It was sent forward to be paid, and the Riggs Bank was its owner when sent. With reference to the jurisdiction of the court over the offence described in the sixth and following counts in the indictment, the court held that if the checks were actually received by the defendant in Washington and the money paid to him by the bank in that city, and the title and ownership of the checks passed to the bank at that time, the court in Missouri had no jurisdiction to try the offences set forth in those counts of the indictment already referred to. There was no question that such was the fact, and it was error to submit the matter to the jury to find some other fact not supported by any evidence. The court said:

"The Government claims that the compensation referred to in this count was sent to the accused by the Rialto Grain and Securities Company, in the form of a check, drawn by it on the Commonwealth Trust Company, payable to the order of the accused, by mail; that he received the check representing this compensation at Washington, in the District of Columbia, and then and there endorsed the check, deposited it to his own credit in the Riggs National Bank at Washington; that the last

mentioned bank afterwards forwarded the check by and through its correspondents to St. Louis for payment by the Commonwealth Trust Company, upon which it was drawn, and that the Riggs Bank and its correspondents in all this matter became and were the agents of the accused for securing this money, and when the money called for by the check was finally paid at St. Louis, Missouri, by the Trust Company, on which it was drawn, it amounted to a payment of that money to the accused at St. Louis, Missouri. This suggests an important feature of the case, for the reason that unless it be true that the accused received the money represented by and paid on this check at St. Louis, this court would have no jurisdiction to try the case."

"The Constitution of the United States confers upon the accused in every criminal case the right to be tried by an impartial jury of a State and district where the crime shall have been committed.

"The receipt of the money is the gist of the crime charged against the accused, and if he did not receive it in this district, in fact in St. Louis, where he is charged to have received it, he is not amenable to the law in this district, and cannot be convicted in this court on this sixth count. Accordingly, it becomes your duty to ascertain and find from the evidence what were the true relations between the accused and the Washington bank, when he deposited the check in question with that bank, and what was the understanding between them as to their respective rights in relation to the check and the proceeds thereof. On this question the court charges you as follows:

"If it was the intent and understanding of the Washington bank and the accused at the time the latter deposited the check in question with the former, that the bank should forward the same in the usual course by and through its correspondents to St. Louis, for payment, and that in so doing it and its correspondents should act only as the agent of the accused for that purpose, then the final payment by the Commonwealth Trust Company at St. Louis, of the check to the correspondents of the Washington bank, would amount in law to a payment in St. Louis as charged in the sixth count, of the amount of the check to the accused. If on the contrary it was the understanding and intent of the Washington bank and the accused at the time the latter deposited the check in question with the former that the bank should become the purchaser of the check, and should thereafter be the absolute owner thereof, and not act as just indicated, as the agent of the accused in the collection of the check, then the payment at St. Louis by the Commonwealth Trust Company would amount in law to a payment to the Washington bank and not to the accused. In the latter event no crime would have been committed by the accused in this district, by reason of the check referred to in the sixth count of the indictment.

"In order to find the accused guilty on the sixth count, you must find from the evidence, by the same measure of proof as is required in all criminal cases, that the check referred to in the sixth count was deposited by the accused in the Washington bank for collection, and that the bank was to act in collecting the same, as the agent of the accused, and not as the owner of the check in question.

"In determining this issue, you are at liberty to and should consider all the evidence adduced; the actual transaction as it occurred at the Riggs Bank where the check was deposited, the check itself and all its endorse-

ments, the rights and privileges which were immediately accorded the accused upon making the deposit, the actual conduct and purpose of the Riggs Bank in forwarding the check to St. Louis for payment, the customary conduct and usage of that bank, and all banks in Washington at the time so far as shown by the proof. And if from all these facts and all other facts disclosed by the proof you find that the check in question was in fact deposited by the accused, with the intent and knowledge on his part, as well as on the part of the bank itself, that it should be forwarded to St. Louis for collection for account of the accused, the bank and its correspondents acting as agents for the accused to make such collection, you should find that when the same was actually paid to the last endorser on the check at St. Louis by the Trust Company upon which it was drawn, it was in contemplation of law paid to the accused himself.

"If on the contrary you find from the evidence that the accused and the Riggs Bank, at the time of the deposit of the check in question, understood and intended that the bank should become the purchaser of the check and be its absolute owner, then the subsequent forwarding of it to St. Louis for payment was the act of the bank itself, and the final payment of the check by the Trust Company at St. Louis was a payment not to the accused, but to the bank, and if such is the fact your verdict on the sixth count must be not guilty."

A careful scrutiny of the evidence with relation to this charge to the jury shows that there was no foundation for submitting to the jury the question of what was the understanding (other than such as arose from the transaction itself, as shown by uncontradicted evidence) between the defendant and the bank at the time when these various checks were deposited with the bank and their proceeds placed to the credit of the defendant. There was no agreement or understanding of any kind other than such as the law makes from the transaction detailed, which was itself proved by uncontradicted evidence offered by the Government itself. In the absence of any special agreement that the effect of the transaction shall be otherwise (and none can be asserted here,) there is no doubt that its legal effect is a change of ownership of the paper, and that the subsequent action of the bank in taking steps to obtain payment for itself of the paper which it had purchased can in no sense be said to be the action of an agent for its principal, but the act of an owner in regard to its own property. The learned judge in his charge to the jury did not, indeed, deny the general truth of this proposition, but he left it to the jury to determine whether there was not an agreement or understanding made or arrived at by the parties at the time the checks were taken by the defendant to the bank, which altered the legal effect of the transaction actually proved. This, as we have said, there was not the slightest evidence of, and it was error to submit that question to the jury.

The general transactions between the bank and a customer in the way of deposits to a customer's credit and drawing against the account by the customer constitute the relation of creditor and debtor. As is said by Mr.

Justice Davis, in delivering the opinion of the court in *Bank of the Republic* v. *Millard*, (10 Wall. 152,) in speaking of this relationship (page 155:)

"It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst and Campbell in the House of Lords in the case of *Foley* v. *Hill*, (2 Clark & Finnelly, 28,) and they all concurred in the opinion that the relation between a banker and a customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authorities is to the same effect."

When a check is taken to a bank, and the bank receives it and places the amount to the credit of a customer, the relation of creditor and debtor between them subsists, and it is not that of principal and agent. This principle is held in *Thompson* v. *Riggs*, (5 Wall. 663,) and also in *Marine Bank* v. *The Fulton Bank*, (2 Wall. 252.) See also *Scammon* v. *Kimball*, (92 U. S. 362, 369;) *Davis* v. *Elmira Bank*, (161 Id. 275, 288.)

The case of *Cragie* v. *Hadley*, (99 N. Y. 131,) contains a statement of the rule as follows, per Andrews, Chief Judge:

"The general doctrine that upon a deposit made by a customer, in a bank, in the ordinary course of business, of money, or of drafts or checks received and credited as money, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question. (*Commercial Bank of Albany* v. *Hughes*, 17 Wend. 94; *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y. 530.) The transaction in legal effect is a transfer of the money, or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts or checks on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."

In *Metropolitan Nat. Bank* v. *Loyd*, (90 N. Y. 530,) one of the cases referred to by Judge Andrews, Judge Danforth, in speaking of the effect of placing a check to the credit of a depositor in his account with the bank, said that—

"The title passed to the bank, and they (the checks) were not again subject to his control. See *Scott* v. *Ocean Bank in City of New York*, (23 N. Y. 289, and other cases cited in the opinion.)

* * * * * *

"It is true no express agreement was made transferring the check for so much money, but it was delivered to the bank and accepted by it, and

the bank gave Murray credit for the amount, and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed, and the right of Murray to command payment at once was of the very nature and essence of the transaction. On the other hand, the bank, as owner of the check, could confer a perfect title upon its transferee, and, therefore, when by its directions the plaintiff received and gave credit for it upon account, it became its owner and entitled to the money which it represented. . . . If, as the appellant insists, the check had been deposited for a specific purpose—for collection, the property would have remained in the depositor, but there is no evidence upon which such fact could be established, nor is it consistent with the dealings between the parties, or with any of the admitted circumstances.

"These show that it was the intention of both parties to make the transfer of the check absolute, and not merely to enable the bank to receive the money upon it as Murray's agent."

The same principle is set forth in *Taft* v. *Bank*, (172 Mass. 363.) In that case the court said: "So when, without more, a bank receives upon deposit a check endorsed without restriction and gives credit for it to the depositor as cash in a drawing account, the form of the transaction is consistent with and indicates a sale, in which, as with money so deposited, the check becomes the absolute property of the banker."

In the case at bar the proof was not disputed. The checks were passed to the credit of defendant unconditionally, and without any special understanding. The custom of the bank to forward such checks for collection is a plain custom to forward for collection for itself. The only liability of defendant was on his endorsement. All this made a payment at Washington, and as a result there was a total lack of evidence to sustain the sixth, seventh, eighth and ninth counts of the indictment. The court should have, therefore, directed a verdict of not guilty on those counts.

This is not a case of the commencement of a crime in one district and its completion in another, so that under the statute the court in either district has jurisdiction. (R. S. sec. 731; 1 Comp. Stat. p. 585.) There was no beginning of the offence in Missouri. The payment of the money was in Washington, and there was no commencement of that offence when the officer of the Rialto Company sent the checks from St. Louis to defendant. The latter did not thereby begin an offence in Missouri.

Fourth. The judgment must also be reversed because of the error in the refusal of the court to charge as requested when the jury came into court and announced an inability to agree. Previous to the retirement of the jury the defendant's counsel submitted to the court certain requests to charge the jury, twelve in all. Those numbered seven, ten and eleven were refused. Numbers ten and eleven referred to the checks and the effect of the transaction of depositing them with the Riggs Bank. The other intsructions referred to many of the questions arising in the case, and

material upon the subject of the trial then before the court. After the court had concluded his main charge to the jury he added that he had been "asked by counsel for the defendant to give certain declarations here, and while I think they have, in the main, been covered by the charge, yet I will give them to you." (They were the instructions requested by defendant and above described.) "These are abstract propositions of law, which I give in connection with the charge, as perhaps more fully amplifying it. I am willing to give them, inasmuch as they are asked, and they contain general propositions of law." The jury then retired, and after being out from Saturday evening at 8 o'clock until the following Monday morning at 10 o'clock without agreeing, returned into court and were charged by the court in relation to their duty as jurors. In the course of that charge the court said to the jury as follows:

"I gather from this letter, Mr. Foreman, what I may be incorrect about. I would like to ask the foreman of the jury how you are divided. I do not want to know how many stand for conviction, or how many for acquittal, but to know the number who stand the one way and the number who stand another way. I would like the statement from the foreman.

"The FOREMAN: Eleven to one.

"The COURT: The jury stand eleven to one. I gather that from the communication. In the light of that fact I feel constrained to make a statement to you, and in making it to use the language of the Supreme Court of the United States as found in *Allen* v. *United States.*" (164 U. S. 492.)

The court then charged the jury in relation to its duty to agree if possible, and directed that the jury should, in the light of the comments of the court then made, retire and make a serious attempt to arrive at a verdict in the case. Counsel for the defendant then asked the court to indicate to the jury that the requests to charge theretofore, asked by the defendant and which were given by the court, constitute as much a part—

"The COURT: If you will wait a moment the jury may retire.

"Mr. KRUM: I beg your Honor to state to the jury——

"The COURT: Stop a moment and then I will hear your argument. I will, after the jury retire, hear counsel if they have anything to say, or any exceptions they may wish to take to the charge. The court here handed the foreman of the jury the charge and instructions heretofore referred to and directed the jury to retire for further consideration of their verdict.

"Mr. LEHMAN: I do not believe that the requests to charge in the manner made by defendant and given by the court to the jury, were given as they should have been, the suggestions being made by the court at the time, that they were mere abstract statements, which had the effect to deprive them of something of their force, when they were not intended as mere abstractions and were believed by counsel to have specific reference to the case; and those instructions as well as others ought to be called to the attention of the jury. We must except here as earnestly as it is in our power to do, against the charge of the court made now.

"The COURT: If you except, I will allow the exception.

"Mr KRUM: What I desire to do in the presence of the jury was to ask your Honor to indicate to the jury, as it was evident the jury did not understand, that it was a fact that the requests to charge which were recognized by the court, acquiesced in by the court and given by the court, were just as much a part of your Honor's charge as that which the court read as emanating from the court itself.

"The COURT: I did tell the jury so on Saturday.

"Mr. KRUM: I submit it is apparent that they do not understand that they are just as much to be controlled by that part of the instructions as any other part. That is evident from the inquiry made.

"The COURT: The court has endeavored to answer the only request made by the jury, and that is all I think should be done."

We think the court should have instructed the jury as requested by counsel for the defendant, and that its refusal to do so was error. Here was a case of very great doubt in the minds of some of the jury. It had deliberated for more than thirty-six hours and been unable to agree upon a verdict. The requests to charge originally made by counsel for defendant had at that time been received as abstract propositions of law, which the court gave in connection with the charge, saying that he was willing to give them inasmuch as they were asked, and as they contained general propositions of law. It does not appear from the bill of exceptions that defendant's counsel then excepted to those remarks by the court, but when the jury subsequently returned into court and announced their inability to agree, counsel for defendant immediately saw the extreme importance of having the requests to charge made to the court regarded by the jury, not as abstract or general propositions of law, but as requests which affected the case then on trial with reference to the facts proved in the case; and so, before the jury again retired, they commenced to propound their requests upon the subject to the court, but the court before listening to them instructed the jury to retire, and then followed the colloquy above set forth between court and counsel.

Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. Considering the attitude of the case as it existed when the jury returned into court for further instructions, we think the defendant was entitled, as matter of legal right, to the charge asked for in regard to the previous requests to charge, which had been granted by the court under the circumstances stated, and it was not a matter of discretion whether the jury should, or should not, be charged as to the character of those requests. A slight thing may have turned the balance against the accused under the circumstances shown by the record, and he ought not to have longer remained burdened with the characterization of his requests to charge, made by the

court, and when he asked for the assertion by the court of the materiality and validity of those requests which had already been made, the court ought to have granted the request.

We must say in addition, that a practice ought not to grow up of inquiring of a jury, when brought into court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended, because we cannot see how it may be material for the court to understand the proportion of division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge. Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain.

Our conclusion is, that the judgment must be reversed and the cause remanded to the District Court of Missouri with directions to grant a new trial.

So ordered.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 343.—October Term, 1904.

Joseph Ralph Burton, Plaintiff in Error, *vs.* The United States. } In error to the District Court of the United States for the Eastern District of Missouri.

[January 16th 1905.]

Mr. Justice Harlan, dissenting.

I dissent from so much of the opinion and judgment as holds that the offences charged against the defendant, based on the checks made at St, Louis and mentioned in the sixth, seventh, eighth and ninth counts, were committed in this District, where the checks were received by him, and not at St. Louis, where they were paid by the bank on which they were drawn for his benefit. I am of opinion that the Riggs National Bank, upon receiving the checks from the accused, became, in every substantial sense, his agent and representative to present the checks and receive the proceeds thereof; in which case, the offence of receiving, by means of those checks, compensation for services rendered in violation of the statute was committed at St. Louis, not at Washington. In a strict sense, no title or ownership of the checks passed to the Riggs National Bank, as in the case of an unconditional sale, consummated by actual delivery, of tangible, personal property for the recovery of the possession of which the owner could, of right, maintain an action in his own name; for, if the St. Louis bank on which the checks were drawn had refused to accept or honor them, no action on the checks, or at all, could have been maintained against it by the Riggs National Bank. *Bank of Republic* v. *Millard*, 10 *Wall.* 152, 156; *First National Bank* v. *Whitman*, 94 *U. S.* 343, 344; *St. Louis &c.* v. *Railway*, 133 *U. S.* 566, 574; *Fourth Street Bank* v. *Yardley*, 165 *U. S.* 634, 643. The checks were made at St. Louis and sent by mail from that city to the accused in discharge of an obligation assumed by his client at that city, and, as between him and his client, in the absence of any special agreement on the subject, compensation for services rendered by him before the Department could only be deemed to have been really made when the checks were paid by the bank on which they were directly drawn. It is true that when the Riggs National Bank received the checks and credited the account of the accused on its books with the amount thereof, there arose, as between that bank and him, only the relation of debtor and creditor. But when his account at that

bank was so credited, he became liable, by implied contract—if the St. Louis bank failed to accept or pay the check when presented—to pay back to the bank an amount equal to the credit he received on the books of the Riggs National Bank. If the St. Louis bank had refused to accept or pay the checks when presented, and if the accused had then sued his client on its original contract with him, the latter could not have resisted recovery upon the ground that he received compensation by having his account at the Washington bank credited with the amount of the checks. Suppose the accused had been indicted in Washington on the day after the checks were endorsed to the Riggs National Bank, and the checks were not honored or paid when presented at the St. Louis bank, could he in that case have been convicted under the statute by proof that he received such credit at the former bank for the amount of the checks? Clearly not. Yet he could have been, if it be true that he was compensated, within the meaning of the statute, when his account with the Riggs National Bank was credited with the amount of the checks. As between the accused and his client, he was not, in any true sense, compensated for the services alleged to have been rendered in violation of the statute, until by payment of the checks by the St. Louis bank he was relieved of all liability to the Riggs National Bank arising from his endorsing the checks to it. The accused is to be regarded as having received, at St. Louis, compensation for his services, because the check made in his behalf was paid there to his representative. The offence was, therefore, consummated at that city, and the Federal court at St. Louis had jurisdiction.

Nor, in my opinion, does the record show any error, in respect of instructions that were to the substantial prejudice of the accused; no error for which the judgment should be reversed.

It seems to me that in reversing the judgment upon the grounds stated in the opinion the court has sacrificed substance to mere form. The result, I submit, well illustrates the familiar maxim: *Qui haeret in litera haeret in cortice.*

True copy.

Test:

Clerk Supreme Court, U. S.